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Supreme Court, U.S.
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No. 90-___

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MAURICE WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 28, 1991

QUESTIONS PRESENTED

1. Is an interpretation of Section 19 of the National Labor Relations Act, 29 U.S.C. § 169, which avoids a conflict with the Religion Clauses of the First Amendment possible, or is the lower court correct in judicially eliminating this portion of the nation's basic labor policy?

2. If the court below correctly determined that a statutory construction of Section 19 which avoids a conflict with the Religion Clauses is not possible, did it err by declaring the statute a nullity, thus denying the benefits of the statute to those Congress intended to benefit?

PARTIES TO THE PROCEEDINGS BELOW

Maurice Wilson and the National Labor Relations Board were the only parties to the proceedings below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. This Case Is Important Because, for the First Time Since the Passage of the National Labor Relations Act in 1935, a Portion of the Nation's Basic Labor Policy Has Been Eliminated by the Judiciary 6

II. This May Be the Only Opportunity to Resolve This Issue 7

III. When the Court Below Vetoed a Basic Portion of Congressional Labor Policy, Its Ruling Came in Conflict With the Precedents Set by This Court 8

TABLE OF CONTENTS - CONTINUED

Page

IV. If the Court Below Had Examined the Legislative History of Section 19, It Would Have Found That a Constitutional Construction of Section 19 is Both Possible and Reasonable 10

V. Congress Has Specifically Instructed the Judiciary That When It Finds a Constitutional Defect in the NLRA, It Should Retain as Much as Possible of What Congress Has Written 16

VI. Even if This Court Should Agree With the Court Below That a Constitutional Construction of Section 19 Is Impossible, the Remedy Adopted Below Is in Conflict With Both the Precedents of This Court and Congressional Intent 18

CONCLUSION 21

APPENDICES

A. Opinion of the United States Court of Appeals for the Sixth Circuit, dated December 4, 1990 ..... 1a

B. Decision and Order of the National Labor Relations Board (which incorporates the July 18, 1988 decision of the Administrative Law Judge), dated March 31, 1989 ..... 13a

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 9, 20

Braden v. Herman, 468 F.2d 592 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973) 7

Califano v. Goldfarb, 430 U.S. 199 (1977) 20

Califano v. Westcott, 443 U.S. 76 (1979) 17, 19

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) 19

Communications Workers v. Beck, 487 U.S. 735 (1988) 8, 10, 11, 16

E&L Transport Co., No. 7-CA-28939 (1989) 7

E&L Transport Co., 17 AMR ¶ 27026 (1989) 7

Ellis v. Railway Clerks, 466 U.S. 435 (1984) 8

Employment Division v. Smith, ___ U.S. ___, 110 S. Ct. 1595 (1990) 6, 18

Grant v. Spellman, 99 Wash. 2d 815, 664 P.2d 1227 (1983) 10

Heckler v. Mathews, 465 U.S. 728 (1984) 20

IAM v. Street, 367 U.S. 740 (1961) 8, 9, 11, 16

TABLE OF AUTHORITIES - CONTINUED

Page

Jimenez v. Weinberger, 417 U.S. 628 (1974) 19

Lemon v. Kurtzman, 403 U.S. 602 (1971) 5

Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) 9

NLRB v. Catholic Bishop, 440 U.S. 490 (1979) 10

Reed v. Collyer, 487 U.S. 1225 (1988) 7

School Committee v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982) 9

Sherbert v. Verner, 374 U.S. 398 (1963) 18

Sherr v. Northport-East Northport Union Free School District, 672 F. Supp. 81 (E.D.N.Y. 1987) 10

United States v. Rumely, 345 U.S. 41 (1953) 10

Welsh v. United States, 398 U.S. 333 (1970) ..... *passim*

Young v. Southwestern Savings & Loan, 509 F.2d 140 (5th Cir. 1975) 14

TABLE OF AUTHORITIES - CONTINUED

Page

Constitutional and Statutory Provisions

U.S. Const. amend. I ..... *passim*

26 U.S.C. § 501(c)(3) 3

28 U.S.C. § 1254(1) 2

National Labor Relations Act

§ 8, 29 U.S.C. § 158 ..... 8, 16

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 6

§ 10(f), 29 U.S.C. § 160(f) 5

§ 16, 29 U.S.C. § 166 ..... 3, 16, 17, 19

§ 19, 29 U.S.C. § 169 ..... *passim*

Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.* 11, 13

Railway Labor Act, § 2, Eleventh, 45 U.S.C. § 152, Eleventh 8

Miscellaneous

120 Cong. Rec. (1974)

pp. 12950-55 12

pp. 12955-56 11

TABLE OF AUTHORITIES - CONTINUED

Page

p. 12968 12

pp. 13536-43 12

p. 16914 13

pp. 16915-16 13

p. 22575 13

p. 22577 13

126 Cong. Rec. (1980)

p. 2580 15

pp. 2581-82 ..... 13, 14, 15

p. 2583 15

p. 2584 15

pp. 3579-80 13

1980 U.S. Code Cong. & Admin. News 7158 14

Webster's New Twentieth Century Dictionary (2d ed. 1978) 17

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PETITION FOR WRIT OF CERTIORARI

Petitioner Maurice Wilson respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on December 4, 1990.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") *infra*, at 1a) will be reported at 920 F.2d 1282. The opinion of the National Labor Relations Board ("NLRB") (App. at 13a),

which incorporates the decision of the Administrative Law Judge ("ALJ") (App. at 16a), is issued *sub nom. Local Union 836, Amalgamated Transit Union (Grand Rapids City Coach Lines, Inc.)*, 293 N.L.R.B. No. 62 (1989).

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT I—Freedom of religion, speech and press; peaceful assemblage; petition of grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

29 U.S.C. § 169. Employees with religious convictions; payment of dues and fees

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organiza-

tion charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure. (July 5, 1935, c. 372, § 19, as added July 26, 1974, Pub.L. 93-360, § 3, 88 Stat. 397, and amended Dec. 24, 1980, Pub.L. 96-593, 94 Stat. 3452.)

29 U.S.C. § 166. Separability of provisions

If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (July 5, 1935, c. 372, § 16, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151.)

STATEMENT OF THE CASE

Maurice Wilson, the petitioner, was an employee of the Grand Rapids City Coach Lines ("employer").[1] The Amalgamated Transit Union, Local 836 ("union") has an agreement with the employer which requires all employees to join or financially support the union as a condition of employment.[2]

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[1] App. at 17a.

[2] *Id.*

Mr. Wilson was not a member of the union.[3] When asked to join or financially support the union he declined because of his sincere religious convictions that joining or financially supporting the union is contrary to the teachings of the Bible.[4] Mr. Wilson's religious beliefs about unions are based on his own religious study, and are not based on the teachings of an "organized" denomination or church of which he is a member.[5] Since he could not financially support the union, Mr. Wilson offered to pay his dues to a charity. This offer was unacceptable to the union which demanded that the employer discharge Mr. Wilson.[6]

Conscious of liability should it discharge Mr. Wilson, the employer filed an unfair labor practice charge based on Section 19 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 169, against the union for making this discharge demand.[7] Briefly stated, Section 19 allows those religious objectors who are members of certain authorized churches to pay their union fees to a charity instead of the union.

The General Counsel of the NLRB issued a complaint and the case went to hearing before an ALJ. The ALJ dismissed the complaint on the basis that Mr. Wilson was not a member of an authorized church.[8] On that same basis, but declining to rule on

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[3] *Id.*

[4] Transcript of ALJ trial ("Tr.") at 12-13, 15-18.

[5] ALJ Hearing, Joint exhibit ("Jt. ex.") 5, at 1 (Oct. 28, 1986 "Statement of Christian Convictions," by Maurice S. Wilson).

[6] Tr. at 49-50; Jt. ex. 8.

[7] Tr. at 50.

[8] App. at 18a-19a.

the constitutional questions involved, a three-member panel of the NLRB upheld the dismissal.[9]

The employer took no further legal action, but Mr. Wilson, fearing the loss of his job, filed a petition for review with the court of appeals.

The court of appeals found that a statute which grants religious exemption based upon membership in a specific religious denomination is subject to "strict scrutiny" and must be supported by a "compelling state interest" that is "closely fitted" by the law.[10] The appeals court found that this distinction between religions was not supported by a compelling state interest. It also found that the statute failed the *Lemon*[11] test.[12]

Although the appeals court agreed with Mr. Wilson that he could not be denied an accommodation of his religious beliefs based on his church membership, the court completely invalidated Section 19. This deprived Mr. Wilson of any basis for claiming an accommodation of his religious beliefs under the NLRA, and thus his petition was denied.

The court of appeals had jurisdiction over this appeal pursuant to § 10(f) of the NLRA, 29 U.S.C. § 160(f).

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[9] *Id.* at 14a & n.1.

[10] *Id.* at 6a.

[11] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[12] App. at 7a-9a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS IMPORTANT BECAUSE, FOR THE FIRST TIME SINCE THE PASSAGE OF THE NATIONAL LABOR RELATIONS ACT IN 1935, A PORTION OF THE NATION'S BASIC LABOR POLICY HAS BEEN ELIMINATED BY THE JUDICIARY.

Section 19 (29 U.S.C. § 169) is the only section of the NLRA which even purports to accommodate the religious beliefs of those employees who cannot, consistent with their conscience, join or financially support a labor union. Through the action of a panel of the Sixth Circuit, this section of the basic labor policy of the country is now, as a practical matter, wiped off the books.

This protection for religious minorities was not eliminated because of a national consensus manifesting itself through an act of Congress. *See Employment Div. v. Smith*, ___ U.S. ___, 110 S. Ct. 1595, 1606 (1990). Instead, this act of Congress was eliminated by a court which opined that it would not "perform a legislative function" or "judicially redraft statutory language." App. at 11a.

Consider the conflict between the court's stated goal of not usurping the legislative function and what it did. Any observer, without taking even a peek at the legislative history of Section 19, would see from the text of the statute that Congress intended to create a safe harbor for religious objectors from the draconian provisions of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), which permit the discharge of employees who decline to support the union. Can it reasonably be said that the judiciary engages in less "judicial[] redraft[ing]" when it takes its judicial pen and blacks out the entire section protecting religious objectors, than when it does its best to save the section by simply blacking out the (admittedly) offensive church membership requirement which limited that protection?

If this Court allows the decision below to stand, it will be the first time since the passage of the NLRA that this Court has

allowed the judiciary to veto a portion of the nation's basic labor policy.

II. THIS MAY BE THE ONLY OPPORTUNITY TO RESOLVE THIS ISSUE.

An employee claiming that his employer or union has committed an unfair labor practice under the NLRA is not permitted to walk into court with his claim. Instead, he must file a charge with the General Counsel of the NLRB. If the General Counsel does not issue a complaint, the employee has absolutely no recourse to force the General Counsel to issue a complaint. *Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973). *See Reed v. Collyer*, 487 U.S. 1225 (1988) (Scalia, J., dissenting from the denial of a petition for writ of certiorari).

Since the NLRB has taken the position in this case that employees like Mr. Wilson are not covered by Section 19 (App. at 14a), and since the appeals court has struck down Section 19 (App. at 12a), it is unlikely that the General Counsel's office will issue a complaint for any religious objector, and almost certain that it will not issue a complaint for an employee in the same position as Maurice Wilson.[13] Thus, in all likelihood, this is the only opportunity for this Court to address this issue.

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[13] For example, in *E & L Transport Co.*, No. 7-CA-28939 (1989), the General Counsel's office of the NLRB refused to issue a complaint for a religious objector under Section 19, citing the NLRB's decision in Mr. Wilson's case. The NLRB also issued an advice memorandum regarding the foregoing case in which it said that personally held religious beliefs would not be protected by Section 19. *E & L Transport Co.*, 17 AMR ¶ 27026 (1989).

III. WHEN THE COURT BELOW VETOED A BASIC PORTION OF CONGRESSIONAL LABOR POLICY, ITS RULING CAME IN CONFLICT WITH THE PRECEDENTS SET BY THIS COURT.

Congress has experienced difficulty drafting the union security provisions[14] of the nation's basic labor laws in a way that avoids constitutional problems. Notwithstanding this difficulty, this Court has never taken upon itself to strike down these union security provisions. In decisions ranging from *IAM v. Street*, 367 U.S. 740 (1961) to the decision two terms ago in *Communications Workers v. Beck*, 487 U.S. 735 (1988), this Court has shown an extraordinary reluctance to strike down union security provisions and a ready willingness to find and implement congressional intent without offending the Constitution.

In *Street*, this Court took the language of section 2, Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh, that required full union membership and full union dues payment as a condition of employment, and decided that it really meant employees were required neither to join the union nor to pay a fee equal to union dues. *Street*, 367 U.S. at 768-69.

In *Beck*, this Court took the provisions of section 8 of the NLRA, 29 U.S.C. § 158, which "requir[ed] as a condition of employment membership [in the union]" and spoke of termination for employees who did not "tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership," to mean that the employee did not have to be a union member as a condition of employment and did not even have to pay union dues. Instead, the employee was only required to reimburse the union for what it could prove it spent for collective bargaining expenses. *Beck*, 487 U.S. at 749-54, 762-63.

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[14] A "union security provision" permits an agreement requiring unwilling employees to either join the union or pay some portion of union fees.

This Court's efforts to save the union security clause of the RLA in *Street* were later termed by Justice Powell, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to be a "strained construction." *Id.* at 248 (Powell, J., concurring).[13] To the same extent that this Court has been willing to repeatedly "strain" to protect the congressional intent to saddle unwilling employees with union security obligations, the Court below should have "strained" to protect the congressional intent to create a safe harbor from union security obligations for religious minorities.

The judicial approach to the union security provisions of the federal labor laws must be balanced. This Court's heroic efforts to save those statutes which impose union obligations on employees should be applied with equal, or greater, vigor to statutes which exempt employees from union obligations. The very nature of the interests at stake requires this.

The Massachusetts Supreme Judicial Court has rightly pointed out, in *School Committee v. Greenfield Education Association*, 385 Mass. 70, 84, 431 N.E.2d 180, 189 (1982), that the interests supporting the imposition of union security obligations are merely statutory and contractual, but the interests of those seeking exemption from union security obligations are bottomed on constitutional right. *Cf. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-31 (1949).

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[13] In a later decision, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court noted that the union security provisions of the RLA would be construed to protect employees from being forced into joining the union or paying a fee which included expenses for activities other than collective bargaining. This construction was followed notwithstanding the fact that the Court specifically noted that the statute contained no explicit limitations of this type, opponents of the legislation objected to it on the basis of this lack of limitations (yet it was passed), and Congress was well aware that the railroad unions used dues for purposes other than collective bargaining. *Id.* at 445-46.

Since the objectors are exercising constitutional rights, if anything, greater effort should be expended to save those provisions which grant exemption from union security obligations. *See United States v. Rumely*, 345 U.S. 41, 47 (1953) (court should "strain" words to avoid constitutional problem).

In addition to this Court's special efforts to preserve union security legislation, this Court has also put forth special effort to ensure that statutes dealing with religion are construed to produce a constitutional result. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (even though statute contained no exception for nonprofit religious schools, the Court read an exception into the statute); *Welsh v. United States*, 398 U.S. 333 (1970) (plurality) (even though statute required "religious belief" in a "Supreme Being" for exemption, and specifically excluded exemption based on "personal moral code," plurality construed statute to allow exemption based on moral belief that was neither religious nor based on a Supreme Being).[16]

IV. IF THE COURT BELOW HAD EXAMINED THE LEGISLATIVE HISTORY OF SECTION 19, IT WOULD HAVE FOUND THAT A CONSTITUTIONAL CONSTRUCTION OF SECTION 19 IS BOTH POSSIBLE AND REASONABLE.

While reading the union membership language out of the statute in *Beck*, this Court spoke of the judicial limits on rewriting statutes to save them from constitutional defect. The conclusion reached by this Court is that statutory [re]construction to save an otherwise unconstitutional statute is permissible if it is not plainly contrary to congressional intent. *Beck*, 487 U.S. at 762.

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[16] Lower courts dealing with religious exemption provisions which are similar to the one at issue here have broadly read the religious exemption to include all religious objectors. *Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81 (E.D.N.Y. 1987); *Grant v. Spellman*, 99 Wash. 2d 815, 664 P.2d 1227 (1983).

The court below not only failed to try to save Section 19 based on the obvious congressional intent discernible from the face of the statute (*i.e.*, to create a safe harbor for religious objectors), it also was unwilling to look at the legislative history of Section 19. App. at 10a.[17]

An examination of the legislative history of Section 19 would have allowed the lower court to act in accord with, and not in opposition to, congressional intent. This Court, in *Beck* and in *Street*, carefully parsed the legislative history of the union security clauses at issue to find a congressional intent that would allow the Court to save the statute. The court below could have done the same to save Section 19.

The language in Section 19 originated as part of the 1974 amendments to the NLRA which brought nonprofit, nonpublic hospitals within its coverage. Part of the debate over the "hospital amendments" arose over the fact that many of these hospitals were run by religious organizations.[18]

One of those organizations, the Seventh-day Adventist Church, had a peculiar complaint. The Church taught its members to refrain from joining or financially supporting labor unions. How could the Church, as the owner of a large number of hospitals, bargain in good faith with a union over union

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[17] Justice Harlan, who thought the judicial reconstruction in *Welsh* had gone too far, stated that it is perfectly proper for this Court to give statutory language a meaning not necessarily envisioned by Congress if the purpose is to achieve legislative policy. *Welsh*, 398 U.S. at 346-47 (Harlan, J., concurring.) In light of the congressional intent reflected in the broad protections for all religious objectors enacted in Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e) *et seq.*, and the legislative history of Section 19, the court below frustrated legislative intent by striking down Section 19.

[18] 120 Cong. Rec. 12955-56 (1974) (remarks of Sen. Cranston).

security clauses which would compel this proscribed support of unions?[19]

The problem was particularly acute in the eyes of Adventist Church leadership because the Church's hospitals employed large numbers of its own Church members. How could the Church teach that members should not support unions, yet compel that very support through a collective bargaining agreement?

An amendment was introduced by Senator Sam Ervin which would resolve this conflict and exempt Seventh-day Adventist hospitals, among others, from the coverage of the hospital amendments.[20] This amendment lost. The debate reveals that one of the chief reasons it lost was that the Senate did not want to exempt a large number of employers from the obligation to bargain, and thus exclude a large number of hospital employees from the benefits of collective bargaining.[21]

Still concerned about Seventh-day Adventists, Congress took another tack to avoid the conflict between extending the NLRA over Adventist hospitals, and the teachings of the Church. The House approached it from the point of view of the employee (church member) instead of the employer (Church hospital). An amendment was proposed which would add a new section to the hospital amendments.[22] This amendment, proposed by Representative Erlenborn, exempted from the coverage of union security clauses hospital employees, like Seventh-day Adventists, who were members of churches which taught their members not

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[19] *Id.* at 12950-55 (remarks of Sen. Ervin, brief of Seventh-day Adventist Church and statement of Melvin Adams).

[20] *Id.*

[21] *Id.* at 12968 (remarks of Sen. Cranston).

[22] Senator Dominick had also introduced in the Senate an amendment which would allow employees to make an alternative charitable payment. This amendment was tabled. *Id.* at 13536-43.

to become union members.[23] This bill passed the House.[24] Later, in a conference committee, the House language adding Section 19 was added to the conference resolution and additional language was added requiring an alternative payment to a charity.[25] Thus, the specific problem raised by the Seventh-day Adventist church was addressed and corrected.

However, in 1980, Section 19 underwent a radical change. While the original amendment was passed to cure the problems that Seventh-day Adventists might face in their own hospitals, the 1980 amendments to Section 19 broadened its coverage from health care employees to all employees covered by the NLRA.[26] The very breadth of the change in the coverage of this statute demonstrated that Congress had moved far beyond the problem of Seventh-day Adventists and their hospitals.

Legislative history for the 1980 amendment is limited, but clear. In the Senate, there was no report or meaningful debate. The members of the House, however, extensively referred to the rights of religious objectors under Title VII (specifically section 701(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j)) and to Title VII cases which held that employees who had religious objections to union membership or the payment of union dues were entitled to pay their fees to a charity.[27] This discussion was in the context of providing employees covered by the NLRA with the same kinds of rights they had under Title VII.

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[23] *Id.* at 16914.

[24] *Id.* at 16915-16.

[25] *Id.* at 22575 (remarks of Sen. Williams) and 22577 (remarks of Sen. Cranston).

[26] 126 Cong. Rec. 3579-80 (1980) (remarks of Rep. Thompson).

[27] *See, e.g., id.* at 2581-82 (remarks of Rep. Clausen).

Therefore, the declared purpose of the 1980 amendment to Section 19 was:

> to resolve any conflict [between the NLRA and Title VII] and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the Federal courts of appeals ruling on the issue have found to be an accommodation acceptable under title VII.[28]

Of course, Title VII protects religious beliefs of all kinds and has no requirement of church membership. *Young v. Southwestern Savings & Loan*, 509 F.2d 140, 142 (5th Cir. 1975).

An examination of congressional debate shows the discussion focused on three dominant points. First, Congress wanted to bring the union security provisions of the NLRA into line with the religious accommodation provisions of Title VII.[29] Second, Congress wanted to create a more direct mechanism for accommodation of religious belief and place its stamp of approval on

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[28] *Id.* at 2582.

[29] The House of Representatives Committee report is reprinted in 1980 *U.S. Code Cong. & Admin. News* 7158. That report contains a statement by several members of the committee discussing the impact of the First Amendment:

> Some feel that the religious accommodation represented by this bill does not rise to the status of a First Amendment issue although others recognize it as such. By recognizing that this bill accommodates the religious beliefs of certain small religions and sects, and thereby reconciles the National Labor Relations Act with the Equal Employment Opportunity Act, we feel that the First Amendment constitutional rights are fully protected, for that is what the Equal Employment Opportunity Act sought to accomplish. Certainly, this bill accepts the principle of religious liberty as guaranteed by our Constitution, and implemented by the Equal Employment Opportunity Act, and it is clear that the bill prefers that principle over any conflict with it raised by our national labor policy.

Id. at 7161.

the charity substitution solution reached by the judiciary.[30] Third, Congress thought that religious objectors had a First Amendment right to refrain from compromising their consciences through the support of labor unions.[31]

Section 19's original purpose was to offer a solution for Seventh-day Adventists whose hospitals and employees were being drawn within the coverage of the NLRA. It was a compromise to avoid a conflict with their distinct religious beliefs. The debate on the 1980 amendment shows that Section 19 was pulled loose from its roots. Its purpose now was to demonstrate that Congress approved of the charity substitution accommodation approved by the judiciary in Title VII cases and that Congress wanted to bring the NLRA into line with that case law.

With this legislative history as background, was the action of the court below, in striking down Section 19, "plainly contrary to the intent of Congress?" The answer is a resounding "yes." The court below, by completely ignoring both the history of the

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[30] Representative Erlenborn stated, "Accommodation can be more rapidly achieved through congressional action than through costly and protracted court litigation." (126 Cong. Rec. 2584 (1980))

[31] Mr. Hinson declared, "This legislation is necessary to reconcile the first amendment of the Constitution with the provisions of the NLRA." (*Id.* at 2580)

Mr. Buchanan made reference to Mr. Hinson's remarks, saying "I would like to join the gentleman in saying we deal here with the constitutional rights of American citizens." (*Id.* at 2581) Mr. Clausen, co-sponsor of the bill, went into considerable detail as to why "laws neutral on their face may, in their application, offend the constitutional requirement of governmental neutrality if free exercise of religion is unduly burdened." (*Id.*)

Mr. Duncan, in commenting on the bill, said "[t]o me, this is a reasonable compromise between the constitutional right to freedom of religion and the statutory right, which has been written into our laws, of union security." (*Id.* at 2583)

Mr. Erlenborn opined that, "[t]his bill accepts the principles of religious liberty as guaranteed by our Constitution and implemented by the Equal Employment Opportunity Act." (*Id.* at 2584)

Others in Congress made similar remarks.

statute and the legislative history of the most recent amendment, did precisely what it said it could not do: act contrary to the intent of Congress. App. at 10a.

If this Court is to take its lead from Congress in dealing with statutory rights, the correct solution here is to interpret the statute to read out the unconstitutional language—the restrictive church membership clause—and retain the religious accommodation language that parallels Title VII rights.

V. CONGRESS HAS SPECIFICALLY INSTRUCTED THE JUDICIARY THAT WHEN IT FINDS A CONSTITUTIONAL DEFECT IN THE NLRA, IT SHOULD RETAIN AS MUCH AS POSSIBLE OF WHAT CONGRESS HAS WRITTEN.

Section 16 of the NLRA, 29 U.S.C. § 166, contains the instruction to the judiciary that if there is a constitutional problem in anything that Congress has written in the statute, the court is to retain as much of the congressional enactment as possible.

This congressional directive compels a search for a constitutional reading of Section 19. Since it is only the church membership language that creates the constitutional problem in Section 19, that language, and that language alone, can and should be read out of the statute. In practical effect, that is precisely what this Court did in both *Street* and *Beck* in reading out the union membership language. (In fact, in *Beck*, this Court did not even reach the issue of whether the Constitution required it to read the union membership provisions out of the statute.) Reading the church membership requirement out of Section 19 is certainly no more onerous than reading the union membership requirement out of Section 8.

The court below refused to use Section 16 to eliminate only the offending portion of Section 19, in part, because:

> Section 16 preserves other provisions of the subchapter when one provision is declared invalid. It does not preserve the remainder of a provision when a portion thereof is invalidated.

App. at 11a.

By this interpretation of Section 16, the court below drew a distinction which is contrary to both the plain meaning of the word "provision" and the decisions of this Court dealing with other savings clauses which use the term "provision."

The court below equated the term "provision" with the formal "sections" of the NLRA. Certainly a section of the NLRA can have more than one provision. Webster's New Twentieth Century Dictionary (2d ed. 1978) defines a provision as: "a clause, as in a legal document, agreement, etc., stipulating or requiring some specific thing; a condition." Here, the provision, the condition, that is invalid is that which requires church membership. Striking out that "provision" and retaining the rest of the "provisions" of Section 19 permit the following reading: "Any employee who [holds] conscientious objections to joining or financially supporting labor organizations shall not be [so required]."

Other federal statutes contain savings clauses which are very similar to Section 16 and which refer to the invalidity of a "provision" of the statute. This Court has relied upon these savings clauses to justify the modification of just a word or phrase in the statute instead of striking down the entire section. *Califano v. Westcott*, 443 U.S. 76, 90 (1979) (savings clause used as partial basis for expanding statutory reference to "his father" to include both mother and father); *Welsh*, 398 U.S. at 364-65 (Harlan, J., concurring in result).

VI. EVEN IF THIS COURT SHOULD AGREE WITH THE COURT BELOW THAT A CONSTITUTIONAL CONSTRUCTION OF SECTION 19 IS IMPOSSIBLE, THE REMEDY ADOPTED BELOW IS IN CONFLICT WITH BOTH THE PRECEDENTS OF THIS COURT AND CONGRESSIONAL INTENT.

Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. at 344 (which carried the day for the plurality) is a model for deferring to legislative purpose when dealing with an unconstitutional statute. *Welsh* dealt with the religious exemption to the selective service law. Justice Harlan was hardly a judicial activist in the area of religious freedom. He dissented in *Sherbert v. Verner*, 374 U.S. 398 (1963), and later wrote in *Welsh*, "the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group." 398 U.S. at 358 n.9. This thinking reflects this Court's recent opinion in *Employment Division v. Smith*, ___ U.S. ___, 110 S. Ct. 1595, 1603 (1990).

Yet, this attitude that the judiciary should not unduly interfere with the legislature compelled Justice Harlan's conclusion in *Welsh* that it was absolutely improper to strike down a religious exemption statute just because (as here) the statute was underinclusive. He said:

> Where a statue is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

398 U.S. at 361.

In *Welsh*, he determined that the proper remedy for an unconstitutional statute was to extend its coverage to those aggrieved by the exclusion. His conclusion was driven not only by the congressional desire to exempt some conscientious

objectors, but also by the fact (as here) that the statute had a savings clause.

> While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Id. at 364.

That is precisely the situation here: the judicial boundaries have been set by Congress. The savings clause, the severability clause cited by Harlan in *Welsh*, is virtually identical to the savings clause applicable to Section 19. *Compare*, *Welsh*, 398 U.S. at 364 with 29 U.S.C. § 166.[32]

Justice Harlan's belief that extension, not nullification, is the proper remedy for constitutional challenges to underinclusive statutes has been adopted and followed by this Court in subsequent cases.[33] *See, e.g., Califano v. Westcott*, 443 U.S. at 89-90; *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974).

The practice of this Court to extend unconstitutional underinclusive statutes, especially when accompanied by a severability provision, is so well known to Congress that when it amended the Social Security Act following the decision of this

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[32] Unlike the court below, Justice Harlan did not draw fine distinctions based on the fact that the savings clause referred to the invalidity of "provisions." (See the preceding section of this brief). Instead, he saw that Congress had instructed the judiciary to save as much as possible and had indicated that it would be "'satisfied with what remained'" *Welsh*, 398 U.S. at 364, quoting *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 235 (1932).

[33] The court below seemed to believe that it was beyond its power to extend the religious exemption clause to include Mr. Wilson. App. at 11a. This Court has held that no such remedial incapacity exits. *Califano v. Westcott*, 443 U.S. at 91.

Court in *Califano v. Goldfarb*, 430 U.S. 199 (1977), it included a severability provision which specifically prohibited an extension. *Heckler v. Mathews*, 465 U.S. 728, 734 & n.3 (1984). This limitation caused the Court to note that ordinarily extension, rather than nullification, is the proper course to take to remedy an underinclusive statute; except where Congress has clearly, through the wording of the severability clause, expressed its preference for nullification. *Id.* at 739 n.5.

The court below did not take the course ordinarily taken by this Court to remedy underinclusive statutes. It did not take the course commanded by Congress through its inclusion of a severability clause in the statute. Instead of extending Section 19, the court below struck it down.

Congress demonstrated its intent to create a safe harbor for religious objectors. When the court below completely demolished that safe harbor by striking down the statute, it not only thwarted the will of Congress, but it crossed the statutory line drawn by Congress for remedying constitutional defects.[34] This Court should hold the court below to the congressional line.

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[34] In its discussion of the propriety of striking down Section 19, the court below referred to the Free Exercise claims raised by Mr. Wilson. The court determined that the Free Exercise clause did not mandate the accommodation sought by Mr. Wilson. App. at 11a-12a. In this the court also erred. This Court, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held that compulsory financial support of labor unions violated the First Amendment associational freedom of nonmembers, but that these rights were overcome by the state interest in requiring reimbursement for bargaining costs. *Id.* at 224-26. Here, Congress has expresaly stated that it intended to create a safe harbor for religious objectors and only compel them to pay fees to a charity. If the court had more closely considered the will of Congress, it would have found that Mr. Wilson's First Amendment asociational and Free Exercise rights were supported, not fettered, by congresaional interest.

CONCLUSION

For the reasons set forth in this petition, it is respectfully requested that review of the decision of the appeals court be granted.

Respectfully submitted,

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February 28, 1991

APPENDICES

APPENDIX A

Opinion of the
United States Court of Appeals
for the Sixth Circuit

December 4, 1990

MAURICE S. WILSON, Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 90-5089.

United States Court of Appeals,
Sixth Circuit.

December 4, 1990.

Before: KRUPANSKY and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

MILBURN, Circuit Judge.

Petitioner Maurice S. Wilson seeks review of a decision of the National Labor Relations Board ("Board") dismissing an unfair labor practice complaint which charged that the union unlawfully demanded that Wilson be discharged for failing to join the union or pay union dues. Because we hold that section 19 of the National Labor Relations Act, 29 U.S.C. § 169, is unconstitutional and cannot be construed as petitioner requests, we deny the petition for review.

I.

In 1986, Grand Rapids City Coach Lines, Inc. ("the Company") and Amalgamated Transit Union, Local 836 ("the Union") were parties to a collective bargaining agreement which included a union security provision requiring employees covered by the agreement to become members of the Union. Maurice Wilson was hired by the Company in August 1986 as a mechanic's helper. On October 20, 1986, the Union asked Wilson to sign a card authorizing the Company to deduct union dues and initiation fees from his wages and forward the money to the Union. Wilson refused to sign the authorization card due to personal

religious convictions against union membership.[1] On November 11, 1986, the Union again asked Wilson to sign the authorization card, and Wilson again declined to do so. However, Wilson did offer to pay an amount equal to union dues to a charitable organization.

On November 18, 1986, the Union made a written request to the Company to discharge Wilson for his failure to pay union dues and initiation fees as required by the collective bargaining agreement. The Company refused to discharge Wilson, and on December 16, 1986, the Union filed a grievance to compel the Company to comply with the collective bargaining agreement. On February 9, 1987, the Company filed an unfair labor practice charge against the Union for demanding Wilson's discharge. On January 19, 1988, the General Counsel for the Board issued a complaint alleging that the Union engaged in an unfair labor practice in violation of 29 U.S.C. § 158(b)(2) by demanding Wilson's discharge, and a hearing on the complaint was held before an administrative law judge ("ALJ") on April 20, 1988.

On July 18, 1988, the ALJ issued a decision recommending that the complaint against the Union be dismissed. The ALJ concluded that the Union's discharge request was proper because Wilson failed to prove that he fit within section 19 of the National Labor Relations Act (NLRA), which exempts from union membership "[a]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations . . . ." 29 U.S.C. § 169. The ALJ determined that

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[1]Wilson is a Christian, and he is a member of Faith Assembly church in Warsaw, Indiana. Faith Assembly has no written creed or statement of doctrine other than the Bible. Wilson's opposition to union membership is based on his personal beliefs derived from the Bible. Among the scriptures relied on by Wilson are Matthew 5, 6, and 7 (the Sermon on the Mount), 2 Corinthians 6:14-18 ("Be ye not unequally yoked together with unbelievers. . . ."), and Ephesians 6:5-9 ("Servants, be obedient to them that are your masters. . . .").

Wilson did not qualify for the section 19 exemption because he was not a member of a "bona fide religion, body, or sect" which holds conscientious objections to union membership. Rather, Wilson objected to union membership on the basis of personal religious convictions.

The General Counsel filed exceptions to the ALJ's decision; however, on March 31, 1989, a three-member panel of the Board affirmed the ALJ's decision and adopted his recommendation that the complaint be dismissed. In a footnote to its decision and order, the panel stated, "Although employee Wilson's personal religious beliefs do include a conscientious objection to joining or financially supporting labor unions, it has not been shown that he is a member of an organized religious group that historically has held the same belief regarding unions." One member of the panel observed that "any possible constitutional problems relative to the religion clauses of the first amendment suggested by the General Counsel need not be addressed." The Company took no further action upon dismissal of the complaint, but Wilson filed the present petition for review of the Board's decision and order.

The principal issues presented are (1) whether section 19 of the NLRA, 29 U.S.C. § 169, violates the religion clauses of the First Amendment, and, if so, (2) whether the statute can be construed to avoid any constitutional defect.

II.

We have jurisdiction to review the Board's order because the events which gave rise to the alleged unfair labor practice occurred in Grand Rapids, Michigan. *See* 29 U.S.C. § 160(f). The issues presented are questions of law which are reviewable de novo. *NLRB v. Hydro Conduit Corp.*, 813 F.2d 1002, 1005 (9th Cir. 1987).

Wilson concedes that his "religious beliefs about unions are his personal convictions, and are not based on the teachings of an 'organized' denomination or church of which he is a member."

Thus, he does not qualify for the religious objectors' exemption under a literal reading of section 19. Because section 19 applies only to employees who are members of a "bona fide religion, body, or sect which has historically held conscientious objections" to joining or financially supporting labor organizations, Wilson contends that the statute violates the religion clauses of the First Amendment. Rather than invalidating the statute, Wilson argues that we should construe section 19 to avoid the constitutional defect by eliminating the membership requirement. Wilson urges this court to construe section 19 as applying to all employees having religious objections to joining or supporting unions, regardless of whether the employees are members of a religion, body, or sect which has historically held such objections. Wilson asserts that the legislative history of section 19 supports his proposed construction of the statute.

Section 19 of the NLRA, as amended in 1980, provides in relevant part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund. . . .

29 U.S.C. § 169. As originally enacted in 1974, section 19 applied only to health-care employees. One court has observed that section 19 was amended in 1980 to reconcile the NLRA with section 701(j) of Title VII. *See International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 170 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

Congress amended Title VII in 1972 to require "employers to take reasonable steps to accommodate their employees' religious beliefs." *Boeing*, 833 F.2d at 168. Section 701(j) of Title VII incorporates the reasonable accommodation duty in the definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). In cases brought under Title VII, courts have held that the duty to accommodate an employee's religious beliefs extends to unions as well as employers. *See Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). Where a collective bargaining agreement includes a union security provision, courts have held that the duty to accommodate is satisfied by allowing an employee to donate an amount equal to union dues to a mutually acceptable charity. *See id.* at 1242; *see also McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 36 (6th Cir. 1982). The substituted charity accommodation lets the union enjoy the benefits of a union security provision while permitting employees "to practice in accordance with their religious convictions." *Tooley*, 648 F.2d at 1242.

While section 19 of the NLRA codifies the substituted charity accommodation, "[t]he protections afforded employees' religious beliefs are not as broad under section 19 as they are under section 701(j)." *Boeing*, 833 F.2d at 169. "[U]nder section 19 only employees who are members of 'bona fide' religions which have 'historically held conscientious objections' to joining unions may contribute to charities in lieu of paying their dues to the union." *Id.* In contrast, Title VII protects "all aspects of religious observance and practice, as well as belief" regardless of membership in a religion, body or sect. 42 U.S.C. § 2000e(j). Thus, "[a]n employee who sincerely held religious beliefs opposing unions could be relieved from paying dues under Title

VII, even if he or she was not a member of an organized religious group that opposes unions." *Boeing*, 833 F.2d at 169.

Section 701(j) of Title VII has been found to be constitutional. *See McDaniel*, 696 F.2d at 37; *Tooley*, 648 F.2d at 1245-46. The initial issue presented in this case is whether section 19 of the NLRA is constitutional. Our analysis begins with the Supreme Court's decision in *Larson v. Valente*, 456 U.S. 228 (1982). "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971)." *Hernandez v. Commissioner Internal Revenue*, 109 S. Ct. 2136, 2146-47 (1989).

Although both parties argue that the statute should be evaluated under the *Lemon* test, we conclude that section 19 is subject to strict scrutiny under *Larson*. "*Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*." *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2870 (1987) (emphasis in original) (citation omitted). Like the statute in *Larson*, which exempted from registration and reporting requirements only those religious organizations that received more than fifty percent of their total contributions from members, section 19 facially discriminates among religions because it exempts from union membership only those employees who are members of "bona fide" religious organizations having the beliefs described in the statute. Thus, section 19 creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute.

When a law facially differentiates among religions, it is subject to strict scrutiny and it "must be invalidated unless it is justified by a compelling governmental interest." *Larson*, 456 U.S. at 247. Moreover, the law must be "closely fitted" to further the compelling governmental interest. *Id.* at 251. The Board

contends that Congress had a compelling reason for drafting section 19 narrowly and that was "to direct 'difficult and troublesome' . . . inquiries concerning the 'religious' nature of an objector's beliefs into a forum significantly better equipped to deal with such issues: the federal courts."

The Board's argument misconceives the nature of the inquiry under strict scrutiny. The Board offers an explanation for the distinction, but it does not identify a compelling governmental interest furthered by the statute. In the absence of any identifiable governmental interest served by the statute, we must declare it unconstitutional. Moreover, even were we to find that the statute served a compelling governmental interest of protecting religious freedom in the workplace, the statute would still fail strict scrutiny. While protection of religious freedom in the workplace may be a compelling governmental interest, section 19 could be more closely fitted to further this interest by paralleling the protection afforded by Title VII, which is without regard to membership in a particular religious organization.

Although application of the *Lemon* test is unnecessary to resolve the present case, we note that section 19 would also fail to pass constitutional muster under that test. *See Larson*, 456 U.S. at 252 (evaluating statute under *Lemon* after finding it failed strict scrutiny). To survive scrutiny under *Lemon*, "the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 251-52, 403 U.S. at 612-13 (citations omitted).

Wilson concedes that section 19 of the NLRA satisfies the first element of the *Lemon* test. The secular purpose element "does not mean that the law's purpose must be unrelated to religion . . . ." *Amos*, 107 S. Ct. at 2868. Like section 701(j) of Title VII, section 19 has a legitimate secular purpose of eliminating discrimination in employment practices. *See Boeing*, 833 F.2d at 168; *McDaniel*, 696 F.2d at 37.

The second prong of the *Lemon* test asks whether the primary effect of the statute advances or inhibits religion. In *Tooley*, the court held that the substituted charity accommodation available under section 701(j) of Title VII "neither increases nor decreases the advantages of membership in the [plaintiffs' religion] in a manner so substantial and direct that it 'advances' or 'inhibits' the plaintiffs' religion." 648 F.2d at 1246. Similarly, in *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981), the court held that application of section 701(j) did not "have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another." The court also noted that section 701(j) "requires no particular sectarian affiliation or theological position . . . ." *Id.* The same cannot be said for section 19.

Unlike section 701(j) of Title VII, section 19 of the NLRA does require a particular sectarian affiliation *and* a particular theological position. Section 19 requires an employee to be a member of *and* adhere to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or supporting unions. Section 19 also has the effect of increasing the advantages of membership in the type of religious organization described in the statute. If an employee is a member of a religion, body, or sect which has historically held conscientious objections to union membership, the employee qualifies for the exemption afforded by section 19, while employees having the same religious convictions against joining or supporting unions, but who are not members in a qualifying religion, must resort to filing an action under section 701(j) of Title VII. Thus, section 19 has the effect of advancing the beliefs of one sect over those of another.

Section 19 also fails the third prong of the *Lemon* test. Section 19 requires employers, and ultimately courts, to determine if the religion, body, or sect of which the employee is a member is bona fide and if it has historically held conscientious objections to joining or supporting unions. This inquiry certainly borders on excessive entanglement with religion. In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian*

Church, 393 U.S. 440, 450 (1969), the Court observed that the First Amendment forbids a court from determining "matters at the very core of a religion—the interpretation of particular church doctrine and the importance of those doctrines to the religion." Unlike section 701(j), the inquiry under section 19 requires more than simply determining if the employee's beliefs are sincere. It requires the court to validate the legitimacy of the religion, body, or sect and to verify the existence and longevity of its doctrine regarding labor unions.

The Board contends that the inquiry required by section 19 is not unlike the "concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption." *Cummins v. Parker Seal Co.*, 516 F.2d 544, 554 (6th Cir. 1975), *aff'd by equally divided Court*, 429 U.S. 65 (1976), *vacated on other grounds unrelated to constitutionality*, 433 U.S. 903 (1977). The Board's analogy to tax cases is unpersuasive. In *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688, 698 (1990), the Court observed that a generally applicable sales tax "is neutral and nondiscriminatory on questions of religious belief." The same cannot be said for section 19 because it distinguishes on the basis of religious belief. In *Hernandez v. Commissioner of Internal Revenue*, 109 S. Ct. 2136, 2147 (1989), the Court held that routine regulatory application of neutral tax laws did not cause excessive entanglement because it involved "*no inquiries into religious doctrine*, no delegation of state powers to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies . . . ." (Emphasis added) (citations omitted). However, application of section 19 does involve inquiry into religious doctrine, and the result is excessive entanglement of government with religion.

Although Wilson argues that section 19 is unconstitutional, he does not seek to have the statute completely invalidated. Rather, Wilson wants section 19 construed so as to avoid the constitutional defect by eliminating the membership requirement. *See Communications Workers v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988). Relying on the principle that courts should construe

statutes to avoid constitutional defects. Wilson argues that the legislative history of section 19 supports construing the statute to apply to all employees having religious objections to union membership without regard to membership in a particular religion, body, or sect.

"It is of course true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Beck*, 108 S. Ct. at 2657. "But statutory construction may not be pressed 'to the point of disingenuous evasion,' and . . . the Court may not embrace a construction that 'is plainly contrary to the intent of Congress.'" *Id.* (citations omitted). We need not review the legislative history of section 19 because it is not "fairly possible" to interpret the statute so as to render it constitutionally valid.

Wilson relies on *Grant v. Spellman*, 99 Wash. 2d 815, 664 P.2d 1227 (1983) (en banc), in which the Washington Supreme Court construed a state statute having language very similar to section 19. The state statute required that "agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member." *Id.* at 1230; Wash. Rev. Code § 41.56.122(1). The court concluded that the statute was susceptible of two meanings, and using a disjunctive reading of the statutory language, the court held that the plaintiff, who held personal religious beliefs against supporting unions but was not a church member, qualified for the statutory exemption from paying union dues.

Although section 19 is similar to the statute construed in *Grant*, there is an important distinction which precludes the type of disjunctive reading given the state statute. The statute in *Grant* could be read disjunctively to "allow a person to claim the union dues exemption based on either (1) bona fide religious tenets, or (2) teachings of a church or religious body of which the

person is a member." 664 P.2d at 1230. However, in section 19, the membership language and the conjunction "and" precede the language read disjunctively in *Grant*. Thus, it is not "fairly possible" to construe the statutory language to eliminate the membership requirement. Accordingly, it is impossible "to interpret the statute in a manner that renders it constitutionally valid." *Beck*, 108 S. Ct. at 2657.

Wilson alternatively urges this court to simply discard the membership language of section 19. Wilson argues that section 19 should be read as follows: "Any employee who holds conscientious objections to joining or financially supporting labor organizations shall not [be so required]." Wilson asserts that this result would be consistent with the savings provision of section 16 of the NLRA, which provides:

> If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

29 U.S.C. § 166.

Wilson's argument amounts to a request for this court to perform a legislative function. However, courts cannot judicially redraft statutory language. *United States v. Locke*, 471 U.S. 84, 95 (1985). The savings provision of the NLRA also fails to rescue Wilson. Section 16 preserves other provisions of the subchapter when one provision is declared invalid. It does not preserve the remainder of a provision when a portion thereof is invalidated. Section 16 also preserves the application of a provision to persons or circumstances other than those as to which it was held invalid as applied. This cannot save section 19 because it is unconstitutional on its face, not as it is applied.

Finally, Wilson argues that section 19 violates the free exercise clause of the First Amendment. Wilson contends that

the free exercise clause requires that section 19 be expanded to protect the religious freedom of all employees, not just members of the religions described in the statute. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez*, 109 S. Ct. at 2148. Thus, to establish a violation of the free exercise clause an individual must first show that the government has placed a substantial burden on the practice of his religion.

Section 19 does not burden Wilson's practice of his religion. Rather, section 19 gives special treatment to members of religions having the beliefs described in the statute because it requires employers to provide a substituted charity accommodation. On the other hand, nonmember employees having the same religious beliefs must file an action under section 701(j) of Title VII to obtain an accommodation. Because section 19 grants a benefit on the basis of membership in a particular religion, it violates the establishment clause, but this does not constitute a violation of the free exercise clause. While the free exercise clause may protect Wilson's religious beliefs, it does not mandate the form of accommodation offered by section 19.

III.

In summary, Wilson persuasively argues that section 19 violates the establishment clause of the First Amendment. However, contrary to Wilson's contention, the statute cannot be construed to remedy the constitutional defect. Moreover, the free exercise clause of the First Amendment does not mandate the form of accommodation offered by section 19. Therefore, we hold that section 19 of the NLRA, 29 U.S.C. § 169, is unconstitutional. Accordingly, the petition for review is DENIED on the merits.

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APPENDIX B

Decision and Order of the National Labor Relations Board (which incorporates the July 18, 1988 decision of the Administrative Law Judge)

March 31, 1989

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293 NLRB No. 62

SCD
D--9487
Grand Rapids, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL UNION 836, AMALGAMATED TRANSIT UNION

and

Case 7--CB--7107

GRAND RAPIDS CITY COACH LINES, INC.

DECISION AND ORDER

On July 18, 1988, Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the

judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although much of the evidence related to Wilson's becoming a member of the Respondent, it is clear that the Respondent offered him the option of either becoming a member or obtaining financial core status through the payment of a sum equal to the dues and initiation fees paid by members.

Chairman Stephens agrees with his colleagues in dismissing the complaint. In his view, any possible constitutional problems relative to the religion clauses of the first amendment suggested by the General Counsel need not be addressed. As found by the judge, the express language of Sec. 19 of the Act limits exemptions from union-security requirements to those employees whose religious objections to joining and financially supporting labor organizations are based on the tenets of "a bona fide religion, body, or sect." Although employee Wilson's personal religious beliefs do include a conscientious objection to joining or financially supporting labor unions, it has not been shown that he is a member of an organized religious group that historically has held the same belief regarding unions. While the Board is obligated to construe legislation in a manner that will avoid constitutional questions, this obligation does not leave us free to adopt constructions that are not "'fairly possible'" *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157 (1983), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Dated, Washington, D.C. March 31, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD--157--88
Grands Rapids, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL UNION 836,
AMALGAMATED TRANSIT UNION

and Case No. 7-CB-7107

GRAND RAPIDS CITY COACH LINES, INC.

Howard M. Dodd, Esq.,
for the General Counsel
Craig Avery, Esq.,
of Comstock Park, Michigan,
for the Respondent.
Robert J. Chovance, Esq.,
of Grand Rapids, Michigan,
for the Charging Party.

Decision

Statement of the Case

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held in Grand Rapids, Michigan, on April 30, 1988, on complaint of the General Counsel against Local Union 836, Amalgamated Transit Union, here called the Union or the Respondent. The complaint issued on January 19, 1988, upon a charge filed on February 9, 1987, by Grand Rapids City Coach Lines, Inc., here called the Company, or the Charging Party. The sole issue presented is whether the Union unlawfully demanded that the Company discharged an employee, and filed a grievance to achieve that objective, in violation of Section 8(b)(2) and the Section 2(6) and the (7) of the Act. A brief was filed by the General Counsel after the close of the hearing.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Company

The Respondent, with a place of business in Grand Rapids, Michigan, is engaged in providing bus operators and maintenance employees to the Grand Rapids are transit authority for the operation and maintenance of public transportation. During the year preceding issuance of the complaint it derived gross revenues in excess of $500,000 dollars and provided services valued in excess of $50,000 dollars to the Grand Rapids Area Transit Authority, which in turn purchased and received goods and services valued in excess of $50,000 dollars from out of state sources. I find that the Company is an employer within the meaning of the Act.

[2]II. The Labor Organization Involved

I find that Local Union 836, Amalgamated Transit Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

During the year 1986 the Company and the Union were parties to a collective bargaining agreement which, among other terms, required employees covered by that contract to become members of the Union. Maurice Wilson had worked for the company two years but had never become a union member. On October 20, 1986, the Union asked Wilson to sign an authorization to the company to deduct Union dues and initiation fees on his behalf and forward the money to the Union. Wilson refused to sign such authorization. On November 11, 1986, the Union again asked Wilson to sign such dues and initiation fees check off, and he again refused. By letter dated November 18, 1986, the Union requested the company to discharge Wilson for such

failure to pay dues and initiation fees. When the Company refused to discharge the man, the Union, on December 16, 1986, filed a grievance to compel the company to live up to the contract in effect. No action has been taken on that grievance. Instead, on February 9, 1987, the company filed the charge in this proceeding. The complaint issued a year later.

Wilson's stated reason for refusing to pay Union dues or initiation fees, as he testified at the hearing, is that "it was against my personal, Christian convictions to join the Union or pay its dues." Wilson added he's a member of a church called "The Body of Jesus Christ."

The complaint rests upon a reading of Section 19 of the 1980 amendment to the National Labor Relations Act. In pertinent part it reads as follows:

> Any employee who is a member of and adheres to established and traditional tenants or teachings of a bonafide religion, body, or sect which has historically held conscienious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment;

If, on the evidence received, Wilson could be said to fall within the scope of the foregoing statutory language, he was free to refuse to join or to pay any money to the Union. If he did not fall within the intended coverage of that language, the Union had a right to have him discharged from this job for refusing to become a Union member. As I read this statute, and consider the totality of Wilson's testimony, I find that he did not fall within the ambit of that statutory protection, and shall therefore recommend dismissal of the complaint.

The statute requires that the employee who refuses to pay Union dues be a "member of" a "bonafide religion, body, or sect," which holds "conscientious objections" to join any Union. There is no evidence here that Wilson is a "member" of any such

"body or sect." As he admitted in his very opening statement at the hearing, it was a "personal" conviction of his upon which he rested his refusal. Instead of resting upon "established and traditonal [3]tenants or teaching", of any "body or sect", he relied upon quotations from the Bible, which he kept reading as he went along with his testimony. He quoted from Galatians, Chapter 5 Verse 1; Sermon on the Mount; Verses and Chapters 5, 6, and 7; Matthew 5, 6 and 7; Corinthians 2nd, Chapter 6, Verse 14. In his letters to the Union, he explained the basis of his religious objections, he quoted Romans 13, 1 to 7; Peter 2, 19 to 21; Titus 3, 1 to 2; Jude 8-10; John 18: 36; Timothy 2, 1 to 3; etc, etc.

In his cross examination of the witness, Counsel for the Union then threw other biblical quotations at the witness, arguing that those citations pointed to another significance in the Bible from the way Wilson read the book.

I have no intention, in this decision, to comment in the least as to who was right and who was wrong in their understanding of the religious teachings of the past. It would not only be a hopeless task, but I am not in the least qualified to express any such views. What all this testimony boils down to, however, is that the witness' defense against having to join the Union, rests entirely upon his idea as to what Jesus Christ, Saint Peter, or any others who are quoted in the Bible, meant when they said this or that. In other words, that any individual could come before the Board, argue his understanding of the Bible, and for that reason alone avoid paying his dues at the Union's demand. If the General Counsel is correct in this case, it means any person could avoid perfectly legal Union membership clauses in his Union's contract that requires membership as a condition of employment by simply arguing how he reads the Bible. I do not think Section 19 of the statute was so intended.

When Wilson first claimed a religious privilege as the basis for his refusal to pay Union dues, the Union officers, aware of the statutory language, asked him which church, or religious organization he belonged to. Admitting, in his written reply, that

"the assembly which I attend is not a denomination of religion organization established by a constitution, or man," he mentioned the phrase "faith assembly", saying it had been located in Warsaw, Indiana. Asked, finally, to be more specific, Wilson told Blank Taylor, the Union's financial secretary, he did not have the address of that group. Recalled as a witness at the close of the hearing, Wilson then admitted he gave Taylor the name of the "minister" of that group, although he knew that man, whoever he was, had been dead for three years. When Taylor, looking into the matter, inquired at Warsaw, he could not locate any such organization. He checked with the police department there but they could not help him either.

With Wilson continuing to generalize how his "church" was based upon various quotations from the Bible — "I, personally, have objections to joining the Union", "they [these beliefs] came to me my own personal consideration", — he was asked why did he not reveal reliably the identity of his "church", or "organization", if in reality there existed such a religious "body, or sect." His only reply, at the hearing, was that he did not want "to involve" that organization. "Because I did not want to involve the leadership within the church or the congregation with this Union squabble, as of now. I, also, stand on this verse myself, because I, personally, have objections to joining a Union and paying the dues set forth from the word of God . . ."

[4]This man may very well have been telling the truth as to how he reads the Bible, or as to his personal religious convictions. I have no reason to doubt that part of his testimony. But as to whether he is, or was, a member of any sect or religious organization he was not telling the truth, either at the hearing or in his earlier talking with the Union agent.

In sum, Section 19 of the Statute makes it an exception to the general rule of law "that whenever there is in effect a collective" a collective-bargaining agreement making Union membership a condition of employment, any employee who refuses to conform to that provision must be discharged at the request of the Union. If the employee in question can prove he

fits into the exception, he escapes the effect of that clause. It is in fact an affirmative defense the employee may offer to keep his job. I view it as a burden placed upon Wilson in this case to prove affirmatively that the exception clause fitted him. He did not prove it. The discharge request by the Union was therefore perfectly proper.

In his post hearing brief the General Counsel admits that Wilson was never a member of any sect or organization or established religious church.

ORDER

I hereby recommend that the complaint be, and it hereby is dismissed.

Dated, Washington, DC July 18, 1988.

/s/
Thomas A. Ricci
Administrative Law Judge

Supreme Court, U.S.
FILED
MAY 22 1991
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(2)

No. 90-1362

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE WILSON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

Section 19 of the National Labor Relations Act, 29 U.S.C. 169, provides that "[a]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment," but "may be required * * * in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund."

The questions presented are:

1. Whether the National Labor Relations Board correctly concluded that Section 19 cannot properly be interpreted to apply to an employee whose religious objection to joining or supporting unions is based on a personal, sincerely held religious belief, rather than on membership in and adherence to the established tenets of a "bona fide religion, body, or sect."

2. Whether Section 19, if so construed, violates the Establishment Clause of the First Amendment.

3. Whether, if Section 19 were found to be unconstitutional, the provision should be nullified, rather than extended to all employees having a religious objection to joining or supporting unions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Arvin Industries, 285 N.L.R.B. 753 (1987)	16
Ashwander v. *TVA*, 297 U.S. 288 (1936)	15
Board of License Comm'rs v. *Pastore*, 469 U.S. 238 (1985)	13
Burns v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)	16
CFTC v. *Schor*, 478 U.S. 833 (1986)	12
Communications Workers v. *Beck*, 487 U.S. 735 (1988)	11, 12
Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987)	5
Crowell v. *Benson*, 285 U.S. 22 (1932)	4
Edward J. DeBartolo Corp. v. *NLRB*, 463 U.S. 147 (1983)	3-4
EEOC v. *University of Detroit*, 904 F.2d 331 (6th Cir. 1990)	16
Fusari v. *Steinberg*, 419 U.S. 379 (1975)	13
International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961)	11
International Ass'n of Machinists, Lodge 751 v. *Boeing*, 833 F.2d 165 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988)	11, 13
Larson v. *Valente*, 456 U.S. 228 (1982)	4, 5, 15, 16
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	5

Cases—Continued: Page

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 16
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979).. 12
NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963) 3
NLRB v. *Mexia Textile Mills Inc.*, 339 U.S. 563 (1950) 14
NLRB v. *Raytheon Corp.*, 398 U.S. 25 (1970) .. 14
Nottelson v. *Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981) 16
Tooley v. *Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981) 16
United States v. *Rumely*, 345 U.S. 41 (1953) ... 12
Welsh v. *United States*, 398 U.S. 333 (1970) 8, 12

Constitution, statues and regulation:

U.S. Const. Amend. I:
Establishment Clause 4, 7
Free Exercise Clause 6
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
§ 701(j), 42 U.S.C. 2000e(j) 4, 10, 16
§ 703(a), 42 U.S.C. 2000e-2(a) 10
§ 703(c), 42 U.S.C. 2000e-2(c) 10
National Labor Relations Board Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2
§ 8(b)(2), 29 U.S.C. 158(b)(2) 2, 14
§ 16, 29 U.S.C. 166 6
§ 19, 29 U.S.C. 169 ..... *passim*
National Labor Relations Act Amendments, 1974, Pub. L. No. 93-360, § 3, 88 Stat. 397 7-8
National Labor Relations Act Amendments, 1980, Pub. L. No. 96-593, 94 Stat. 3452 10
29 C.F.R. 1605.2(d)(2) 13

Miscellaneous: Page

120 Cong. Rec. (1974):
p. 12,536 9
p. 12,950 8
p. 12,968 8
pp. 13,535-13,543 8
p. 13,536 .....
p. 13,539 8
pp. 16,902-16,903 9
p. 16,914 9
p. 16,915 9
pp. 16,915-16,916 9
126 Cong. Rec. (1980):
p. 2580 10
p. 2581 11
pp. 2581-2582 11
p. 2582 11
p. 2583 10
p. 2584 ..... 10, 11
H.R. Rep. No. 1175, 93d Cong., 2d Sess. (1974) 9
H.R. Rep. No. 496, 96th Cong., 1st Sess. (1979) 10, 11
Staff of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974* (Comm. Print 1974) 8, 9
S. Rep. No. 988, 93d Cong., 2d Sess. (1974) ... 9

In the Supreme Court of the United States

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No. 90-1362

MAURICE WILSON, PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 920 F.2d 1282. The opinion of the National Labor Relations Board (Pet. App. 13a-21a) is reported at 293 N.L.R.B. No. 62.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1990. The petition for a writ of certiorari was filed on February 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Grand Rapids City Coach Lines, Inc. (the Company) and Local 836, Amalgamated Transit Union (the Union) were parties to a collective-bargaining agreement that required employees to become "members of the Union" by tendering dues and initiation fees. Pet. App. 17a. The Union asked petitioner, a Company employee, to sign a card authorizing the Company to deduct union dues and initiation fees from his wages and forward the money to the Union. Petitioner refused to sign the authorization card, citing his personal religious belief against joining a union or paying its dues. *Id.* at 17a-20a.

The Union made a request to the Company to discharge petitioner for his failure to pay union dues and initiation fees. Pet. App. 17a-18a. The Company refused to do so, and filed an unfair labor practice charge against the Union. *Id.* at 18a. The National Labor Relations Board's General Counsel issued a complaint, alleging that petitioner's refusal to pay union dues and fees was protected by Section 19 of the Act, 29 U.S.C. 169, and that the Union had violated Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2), by requesting petitioner's discharge. Pet. App. 16a-18a.[1]

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[1] The unfair labor practice complaint rested on the interrelationship of three provisions of the Act – Section 8(b)(2), Section 8(a)(3), and Section 19.

Section 8(b)(2), 29 U.S.C. 158(b)(2), prohibits a union from "caus[ing] or attempt[ing] to cause an employer to discriminate against an employee in violation of" Section 8(a)(3).

Section 8(a)(3), 29 U.S.C. 158(a)(3), prohibits employer discrimination based on union membership or lack of membership. The first proviso to Section 8(a)(3), however, creates a limited exception for union security agreements. It permits an agreement between a union and an employer requiring, "as a condition of employment[,] membership [in the union] on or after the thirtieth day following the beginning of such employment" (29 U.S.C. 158(a)(3)); "the burdens of membership upon

2. The Board, affirming the decision of an administrative law judge, dismissed the unfair labor practice complaint. It concluded that petitioner was not within the scope of Section 19 because he had not shown that he was a member of a bona fide religion, body or sect which historically held conscientious objections to joining or supporting labor organizations, as required by the express language of Section 19. Pet. App. 13a-14a, 18a, 20a-21a. In concurrence, Chairman Stephens observed that the Board did not need to address "any possible constitutional problems." *Id.* at 14a n.1. He noted that, "[w]hile the Board is obligated to construe legislation in a manner that will avoid constitutional questions," the Board was not "free to adopt constructions that are not "fairly possible.' " *Ibid.* (quoting *Edward J.*

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which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963).

Section 19, 29 U.S.C. 169, in turn, creates an exemption from the obligation imposed by a union security agreement. It provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

DeBartolo Corp. v. NLRB, 463 U.S. 147, 157 (1983) and *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

3. Petitioner sought review of the Board's order dismissing the unfair labor practice complaint. He contended that Section 19, as construed by the Board, violated the Religion Clauses of the First Amendment, and that the Board erred in failing to adopt a broader construction that would have read the "membership" requirement out of Section 19 and thus cured any constitutional defect. Pet. App. 3a-4a.

The court of appeals agreed with the Board that petitioner "does not qualify for the religious objectors' exemption under a literal reading of section 19." Pet. App. 4a. The court also agreed that it was not "fairly possible" to construe Section 19 to eliminate the "membership" requirement and thereby make it applicable to all employees with religious objections to joining or supporting unions, regardless of whether the employees are members of a religion, body or sect which has historically held conscientious objections. *Id.* at 10a.[2] The court concluded, however, that Section 19, as so construed, violates the Establishment Clause. Pet. App. 6a-9a, 12a.

The court first stated that *Larson* v. *Valente*, 456 U.S. 228 (1982), "indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971)]." Pet.

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[2] The court observed that the coverage of Section 19 is not as broad as the coverage of Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S. 2000e(j). Section 701(j) protects "all aspects of religious observance and practice, as well as belief," regardless of membership in a religion, body, or sect. Pet. App. 5a. The court noted that Title VII has been interpreted to require unions and employers to accommodate an employee's religious objections to union support by allowing an employee to donate an amount equal to the amount of union dues to a mutually acceptable charity. *Ibid.*

App. 6a (quoting *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 339 (1987)). The court found that, like the statute in *Larson*, Section 19 "facially discriminates among religions" and "creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute." *Ibid.* Accordingly, Section 19 "is subject to strict scrutiny and it 'must be invalidated unless it is justified by a compelling governmental interest' "; moreover, it "must be 'closely fitted' to further the compelling governmental interest." *Ibid.* (quoting *Larson*, 456 U.S. at 247, 251). The court concluded that, while the Board had offered "an explanation for the distinction" (*i.e.*, Congress drafted Section 19 narrowly in order to direct difficult inquiries concerning the religious nature of an objector's belief into a forum better equipped to deal with such issues, the federal courts), it did not "identify a compelling governmental interest served by the statute." Pet. App. 7a. Moreover, even if it were found that Section 19 served the "compelling governmental interest of protecting religious freedom in the workplace," it "could be more closely fitted to further this interest by paralleling the protection afforded by Title VII, which is without regard to membership in a particular religious organization." *Ibid.*

The court added that, although "application of the *Lemon* test is unnecessary to resolve the present case," Section 19 "would also fail to pass constitutional muster under that test." Pet. App. 7a. In the court's view, Section 19 "has a legitimate secular purpose of eliminating discrimination in employment practices" (*ibid.*), but fails the second and third prongs of the *Lemon* test. According to the court, Section 19 has the impermissible effect "of increasing the advantages of membership in the type of religious organization described in the statute. If an employee is a member of a [qualifying] religion * * * [he receives] the exemption afforded by Section 19, while employees * * * who are not

members * * * must resort to an action under * * * Title VII." Pet. App. 8a. Furthermore, because Section 19 requires the Board to determine if a religion is "bona fide" and has "historically held conscientious objections," it necessitates an inquiry that "borders on excessive entanglement with religion." *Ibid.*

The court rejected petitioner's request that it "simply discard the membership language of Section 19," stating that "courts cannot judicially redraft statutory language." Pet. App. 11a. Nor, in the court's view, was such revision permitted by Section 16 of the Act, 29 U.S.C. 166.[3] That Section "preserves other provisions of the [Act] when one provision is declared invalid," but does not "preserve the remainder of a provision when a portion thereof is invalidated." Pet. App. 11a. It "preserves the application of a provision to persons or circumstances other than those to which it was held invalid as applied," but "cannot save Section 19 because it is unconstitutional on its face." *Ibid.*

Accordingly, the court denied petitioner's request to set aside the Board's order dismissing the unfair labor practice complaint; it concluded that Section 19 violates the Establishment Clause and that Section 19 should be invalidated, rather than extended. Pet. App. 12a.[4]

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[3] Section 16, 29 U.S.C. 166, provides:

> If any provision of this [Act], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this [Act], or the application of such provision to persons or circumstances other than those as to which it is invalid, shall not be affected thereby.

[4] The court rejected petitioner's additional contention that Section 19, as construed by the Board, violates the Free Exercise Clause. The court noted that "to establish a violation of the free exercise clause an individual must first show that the government has placed a substantial burden on the practice of his religion." Pet. App. 12a. The court concluded that "Section 19 does not burden [petitioner's] practice of

ARGUMENT

The court of appeals correctly upheld the NLRB's determination that Section 19 extends only to members of certain religious groups that had historically held conscientious objection to supporting unions. The question whether Section 19, as so construed, violates the Establishment Clause presents a difficult question of constitutional law. We believe, however, that, in view of the unusual circumstances regarding petitioner's claim, this case presents a rare instance in which review is not warranted, even though the court of appeals concluded that a statutory provision is unconstitutional.

1. As the court of appeals correctly recognized, Section 19's plain language applies only to employees who are "member[s] of and adhere[ ] to" the tenets of a "bona fide religion" that has "historically held conscientious objections" to joining or financially supporting unions. Petitioner nevertheless suggests that the provision should be construed to apply to all employees with religious objections because the legislative history compels that conclusion. Pet. 10-16. Even if the legislative history supported petitioner's characterization, it could not overcome the clarity of the statutory text. Contrary to petitioner's contention, however, the legislative history of Section 19 confirms that the membership limitation was considered and intentional.

a. Section 19 was originally enacted as part of the National Labor Relations Act Amendments, 1974, Pub. L.

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his religion." Rather, "it requires employers to provide a substituted charity accommodation" to "members of religions having the beliefs described in the statute," while "nonmember employees having the same religious beliefs must file an action under Section 701(j) of Title VII to obtain an accommodation." Although it protects petitioner's religious beliefs, "the free exercise clause * * * does not mandate the accommodation offered by Section 19." Pet. App. 12a.

No. 93-360, § 3, 88 Stat. 397, and applied only to the health care industry. During consideration of the 1974 Amendments, the Senate rejected an amendment proposed by Senator Dominick that would have exempted from union dues obligations all employees with religious objections to support of unions, regardless of membership in a religious group that espoused such an objection. 120 Cong. Rec. 13,535-13,543 (1974); Staff of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Coverage of Non-profit Hospitals under the National Labor Relations Act, 1974*, at 70-71, 193-212 (Comm. Print 1974) (*Leg. Hist.*)[5] The legislative debate regarding Senator Dominick's amendment reveals congressional concern about the reach of such a religious objector exemption and about the propriety of thrusting the Board into such difficult constitutional questions. This concern was particularly pronounced in light of this Court's then-recent decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), extending the religious objector provisions of the selective service laws to those with moral, ethical, or religious objections occupying the place of religion in one's life.[6]

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[5] The Senate had earlier rejected an amendment proposed by Senator Ervin to exempt from the 1974 Amendments any hospital "owned, supported, controlled, or managed by a particular religion or by a particular religious corporation or association." 120 Cong. Rec. 12,950 (1974), *Leg. Hist.* 118-119; 120 Cong. Rec. 12,968, *Leg. Hist.* 141.

[6] See 120 Cong. Rec. 13,539 (1974), *Leg. Hist.* 203 (Sen. Taft) ("Would not the National Labor Relations Board be forced into some of the difficult and troublesome legal and practical questions that have faced the Selective Service Commission on this point? For example, the Supreme Court in *Welsh* v. *U.S.*, 398 U.S. 333 (1970), held that an individual could qualify as a conscientious objector if opposition to war stemmed not only from religious teachings, but also from deep-seated nonreligious teachings against war. Would not the same analogy apply with respect to the standards in the proposed amendment?");

Thereafter, Representative Erlenborn introduced a proposal in the House, limited to members of qualifying religious organizations who work for health care institutions. Representative Erlenborn stated that his amendment was "very narrowly drawn and would provide only that religious beliefs held by a person who is a member of a sect that has held these beliefs as a religious tenet will be able to ask for this waiver." 120 Cong. Rec. 16,902-16,903 (1974), *Leg. Hist.* 298. During the debate on the amendment, Representative Green noted that there were only seven religious groups with the requisite religious teachings. 120 Cong. Rec. 16,915, *Leg. Hist.* 334. Representative Erlenborn emphasized that his proposal was "more narrowly drawn than the conscientious objector provision of the military draft law and * * * would affect only a very small number of people because there are only a few religions that do hold this religious belief." 120 Cong. Rec. 16,914, *Leg. Hist.* 332. The Erlenborn amendment was agreed to in the House (120 Cong. Rec. 16,915-16,916, *Leg. Hist.* 336-337), and, with modifications not pertinent here, was acceded to by the Senate in the Conference and became the original Section 19. H.R. Rep. No. 1175, 93d Cong., 2d Sess. 3 (1974), *Leg. Hist.* 347; S. Rep. No. 988, 93d Cong., 2d Sess. 3 (1974), *Leg. Hist.* 347.

b. Petitioner acknowledges (Pet. 11-13) that Section 19, as originally enacted in 1974, applied only to members of religions with historical objections to supporting unions. Petitioner contends, however, that when Congress broadened Section 19 in 1980 by deleting the limitation on coverage to health care employees, the provision "underwent a radical change." Pet. 13. Petitioner is mistaken.

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120 Cong. Rec. 13,536, *Leg. Hist.* 195 (Sen. Williams) (the Board's determination "whether the employee is a bona fide religious objector * * * would not only be time-consuming, it would involve esoteric and highly sensitive interpretations.").

In 1980, Congress "amend[ed] Section 19 of the National Labor Relations Act by making the section apply to 'any employee' instead of just employees in the health care industry." H.R. Rep. No. 496, 96th Cong., 1st Sess. 3 (1979). See National Labor Relations Act Amendment, 1980, Pub. L. No. 96-593, 94 Stat. 3452. The pertinent language of Section 19, however, was not otherwise changed.[7] The legislation thus extended Section 19 to any member of "a bona fide religion which historically has held conscientious objection to joining or financially supporting a labor organization." H.R. Rep. No. 496, *supra*, at 2.[8]

The legislative history reveals congressional awareness and approval of the fact that Title VII of the Civil Rights Act, which prohibits religious discrimination by employers and unions (42 U.S.C. 2000e(j), 2000e-2(a), 2000e-2(c)), had been interpreted to apply to those objecting on religious

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[7] The 1980 amendment also added the last sentence to Section 19, see note 1, *supra*, providing that religious objectors could be charged if they used the union's grievance procedures. 94 Stat. 3452.

[8] Similar statements were made by supporters of the amendment. Representative Erlenborn explained that Section 19 addressed the needs of "individuals belonging to certain religions and sects who hold religious beliefs against joining or financially supporting labor organizations." 126 Cong. Rec. 2583 (1980). See also *id.* at 2580 (Rep. Thompson) (Section 19's "provisions would apply to any person who can produce adequate verification of membership in a bona fide religion that has historically held conscientious objections to joining or financially supporting a labor organization"); *ibid.* (Rep. Hinson) (Amendment applies to "any employee who is a member" and accommodates "the beliefs of certain religions which prohibit membership in or financial support of a labor organization"); *id.* at 2583 (Rep. Duncan) ("Anyone claiming this status must show membership"); *id.* at 2584 (Rep. Ashbrook) (1974 amendment applied "if any employee of a health care institution belonged to a religion or sect which historically held conscientious objection * * *. This bill expands those protections * * * to all employees, not just employees of health care institutions.").

grounds to union security agreements. See, *e.g.*, H.R. Rep. No. 496, *supra*, at 2; 126 Cong. Rec. 2581-2582 (1980) (Rep. Clausen); *id.* at 2584 (Rep. Erlenborn). Title VII and Section 19 thus would be "complementary" and would be "reconcile[d]" under the 1980 amendment. 126 Cong. Rec. 2582 (Rep. Clausen); H.R. Rep. No. 496, *supra*, at 2. The availability of Section 19, moreover, would avoid the necessity of repetitive litigation for established claims. 126 Cong. Rec. 2581 (Rep. Clausen); *id.* at 2584 (Rep. Erlenborn). As noted above, these observations were made in a context in which the membership limitation of Section 19 was repeatedly reiterated.

Thus, even if it is necessary to consult the legislative history – which, in view of the clarity of the statutory text, it is not – that history confirms that the membership limitation of Section 19 was intentional.[9]

c. Petitioner contends (Pet. 8), citing *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961) and *Communications Workers* v. *Beck*, 487 U.S. 735 (1988), that the Court has previously been willing to interpret the union security provisions of the labor laws in order to avoid constitutional problems and that it should avoid a constitutional problem here by deleting the membership requirement from

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[9] We note that, in 1987, the Department of Justice submitted an amicus brief to the Ninth Circuit, in a case concerning a union's claim that Section 19 limited the scope of Title VII, in which the United States argued that, if the court found it necessary to reach the issue, Section 19 should be construed to apply to all religious objectors. Gov't Amicus Br. at 19-23, filed in *International Ass'n of Machinists, Lodge 751* v. *Boeing*, 833 F.2d 165 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988). The government's amicus brief (at 20 n.9) noted that this aspect of Section 19 had not then been construed by the National Labor Relations Board. Upon further review of the pertinent legislative materials, and in light of the Board's subsequent construction of Section 19, we now conclude that the Board is correct in adhering to the plain meaning of the statutory text.

Section 19 and extending its coverage to individually held religious beliefs against giving financial support to unions. In *Beck*, however, the Court emphasized that it may not choose an interpretation " 'plainly contrary to the intent of Congress' " in order to avoid constitutional questions. 487 U.S. at 762. See also *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986) ("[T]his canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication."). As shown, there is no basis for concluding that Congress intended coverage under Section 19 to extend beyond the designated religious groups.[10]

2. The constitutionality of Section 19 presents a difficult issue. Although a court of appeals' conclusion that a statutory provision is not constitutional is ordinarily a sufficient basis for this Court's review, we conclude that, in the unusual circumstances of this case, further review is not warranted.

At the outset, we note that there is a possible mootness question. It is well established that Title VII provides extensive protection to religious objectors, such as petitioner, whose religious objections to union security agreements

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[10] Petitioner's reliance on other decisions of this Court (Pet. 10) is similarly misplaced. In *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the Court found no "affirmative intention" that Congress intended to cover parochial school teachers under the National Labor Relations Act. 440 U.S. at 500-501, 504. Here the intention of Congress to limit Section 19 to certain religious groups is explicit. In *Welsh* v. *United States*, 398 U.S. 333 (1970), the Court construed the Selective Service Act religious conscientious objector provision to include personal beliefs; when Section 19 was initially enacted, in contrast, Representative Erlenborn specifically noted that Section 19 was more narrowly drawn than the military draft exemption. See page 9, *supra*. And, in *United States* v. *Rumely*, 345 U.S. 41, 47 (1953), the Court found that the Congressional Resolution at issue left open a "[c]hoice" as to the proper definition to be given the term "lobbying." Section 19 leaves no choice as to whether the limiting language may be read out of the provision.

are based on personal religious objections.[11] Here, after completion of the NLRB proceedings, petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging the Union with religious discrimination.[12] Although the complaint was filed after the NLRB proceeding and is not part of the record of that proceeding, petitioner cited it as a related case on his court of appeals docketing sheet, and we bring it to the Court's attention because its disposition may raise a question of mootness.[13] In July 1990, the EEOC sent petitioner a reasonable cause letter.[14] Although petitioner never filed suit, the EEOC subsequently obtained the Union's formal agreement, in November 1990, to provide accommodation for any individual with religious objections to union security agreements, regardless of membership in a religious organization.[15] A question of mootness thus arises because peti-

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[11] See, *e.g.*, *International Ass'n of Machinists, Lodge 751* v. *Boeing*, 833 F.2d 165 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1988); 29 C.F.R. 1605.2(d)(2) (EEOC Guidelines on Discrimination Because of Religion).

[12] In the court of appeals, petitioner stated that his EEOC complaint was filed because the Union had filed a separate lawsuit against the Company seeking his dismissal, a suit that was eventually dismissed upon agreement of the parties. See Petitioner's Letters to C.A., Sept. 11 & 18, 1990; see also NLRB Letter to C.A., Sept. 13, 1990.

[13] See *Board of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) ("[C]ounsel • • • have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation," and questions of possible mootness "should be called to the attention of the Court *without delay*"); *Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

[14] Petitioner provided the NLRB with copies of his complaint and of the EEOC's reasonable cause letter.

[15] In a notice posted by the Union (and provided by the Union to the NLRB), the Union explained that the notice was posted as "part of the remedy agreed to pursuant to a conciliation agreement between"

tioner's employment was not terminated or otherwise suspended as a result of his objections; petitioner was not required to pay union dues; and the Union has entered into an agreement with a government agency committing itself to accommodate those, like petitioner, who have personal religious objections.

Despite these facts, we believe that petitioner's claim is not moot. Petitioner maintains that the Union's initial request that he be fired was an unfair labor practice. If petitioner were covered by Section 19, it would have been a violation of Section 8(b)(2) of the Act for the Union to "attempt to cause" the Company to discharge him for failure to pay dues because of a *bona fide* religious belief. See note 1, *supra*. In those circumstances, cessation of the unlawful conduct, or even compliance with a Board order, would not "render the case moot" or remove the basis for a Board cease-and-desist order if the Board decided that such an order was warranted. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950); see also *NLRB* v. *Raytheon Corp.*, 398 U.S. 25, 27-28 (1970).

Nevertheless, although we do not believe that the case is moot, petitioner's claim of an actual and continuing injury is, in this context, quite thin and insubstantial. In our view, it is so thin that it is an inadequate basis for requiring this Court to resolve the constitutional questions presented. In other contexts, this Court has repeatedly stressed the need for prudence in the adjudication of con-

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the Union and the EEOC. The Union further announced, as part of that agreement, that it would "accommodate individuals in the collective bargaining unit with respect to sincerely held religious beliefs by not requesting their termination." The Union also advised that "[i]ndividual[s] affected by our conduct will be made whole for any losses they suffered as a result of the discrimination against them," and that "employees will not be discriminated against on the basis of their religion."

stitutional claims. See generally *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). With regard to this case, as a practical matter, very little now turns on the outcome of petitioner's constitutional claim.

Indeed, petitioner's claim is especially attenuated because, if petitioner were to prevail on his contention that Section 19 should be broadly construed and the case were remanded to the Board, it is likely that the Union would be willing to settle the Board case on the same terms that it reached with the EEOC and that the Board would accept that resolution of the dispute. Petitioner's claim is also attenuated because, even under the court of appeals' conclusion that the provision is unconstitutional, he is not entitled to the relief that he seeks (see Pet. App. 12a)—relief that is, in any event, essentially duplicative of relief already provided.[16]

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[16] We note that, in addition to the fact that petitioner has obtained substantial relief under Title VII, the availability of Title VII is critical to a correct understanding of Section 19. In our view, the court of appeals failed to properly appreciate its significance. Unlike *Larson* v. *Valente*, *supra*, this case does not concern a substantive difference in the imposition of a burden on different religious groups; rather, it involves differences in procedural mechanisms in the context of generally applicable protections for all religious objectors. The principal difference between Section 19 and Title VII is that Section 19 is enforceable through the National Labor Relations Act procedural machinery and the National Labor Relations Board, while Title VII is enforceable through the Civil Rights Act procedural machinery and litigation in the federal courts. As noted, in the congressional consideration of Section 19, concern was expressed about the Board's competence in addressing the difficult and sensitive constitutional issues of personal religious objections, and Section 19 is thus limited to those claims that are the most readily identifiable and verifiable. The substantive protections afforded by Section 19 and Title VII, however, are very similar. Both allow exemptions from union security agreements, and both permit substitute charity contributions in lieu of union contributions. See,

Further considerations also counsel against review. This is a case of first impression and, at least to this point, does not appear to be of recurring significance. Furthermore, there is no court of appeals conflict on this issue and, indeed, no other court of appeals decisions on the subject.[17]

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e.g., *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239, 1242-1243 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). Although an "undue hardship" defense is available under Title VII, see 42 U.S.C. 2000e(j); *Tooley*, 648 F.2d at 1243-1244, courts have found that, with a substitute charity accommodation, exemptions from union security agreements based on religious objections did not present such an undue hardship. See, *e.g.*, *Nottelson* v. *Smith Steel Workers*, 643 F.2d 445, 451-452 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403, 406-407 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979). (Different problems may be presented when an employee's religious objection is, not to unions as such, but to the particular activities of a particular union. See *EEOC* v. *University of Detroit*, 904 F.2d 331 (6th Cir. 1990)).

We also note that neither party below contended that Section 19 should be analyzed under the *Larson* v. *Valente* test, see Pet. App. 6a, and petitioner does not even cite *Larson* in his petition. Indeed, it is not clear that petitioner could appropriately rely on *Larson*. That case involved distinctions between sects; petitioner's claim does not rest on his membership in a sect that does not meet the requirement of Section 19 but rather on his personal religious beliefs. See Pet. App. 3a-4a. See also *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984) (describing *Larson* as a case "where there was substantial evidence of overt discrimination against a particular church").

[17] Although petitioner suggests that, if this case is not reviewed, the issue cannot arise in future judicial review of Board decisions (Pet. 7), this assertion is incorrect. The scope of Section 19 could arise, for instance, in an employer's defense to a union's charge that the employer improperly failed to discharge an employee with personal religious objections to a union security agreement; the Board would be required to respond to such a defense, and the Board's determination would be fully reviewable in the courts of appeals if the usual prerequisites for judicial review were satisfied. See also *Arvin Industries*, 285 N.L.R.B. 753, 757 (1987) (explaining that, in view of congressional intent and

Although these considerations would ordinarily not be an adequate basis for denying review of a court of appeals' determination that a statutory provision is unconstitutional, they support the conclusion that review is not warranted in this case, in which resolution of the constitutional issues will have very little effect on the resolution of the underlying dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

Act's venue provisions, a single court of appeals decision does not necessarily bind Board in its implementation of nation-wide labor policy).

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No. 90-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE S. WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF REASONS FOR GRANTING THE WRIT	3
ARGUMENT	3
I. The Conscience Clause Sought A Legislative Accommodation for Religious Dissenters to Burdens Created by Federal Labor Laws	3
II. If Wilson's Beliefs Against Financially Supporting a Labor Organization are Truly Religious, The Court Should Interpret Section 19 so as to Find it Constitutional	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Employment Div., of Oregon v. Smith, ___ U.S. ___, 110 S. Ct. 1595 (1990)	2,3,5,10
Gillette v. United States, 401 U.S. 437 (1971)	9
Larson v. Valente, 456 U.S. 228 (1982)	9
Lynch v. Donnelly, 465 U.S. 668 (1984)	7
Meek v. Pittenger, 421 U.S. 349 (1975)	7
Murray v. The Charming Betsy, 2 Cranch 64, 6 U.S. 64 (1804)	8
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)	8
Sherbert v. Verner, 374 U.S. 398 (1963)	2,5,9
United States v. Lee, 455 U.S. 252 (1982)	9
Wallace v. Jaffree, 472 U.S. 38 (1985)	9
Walz v. Tax Comm'n. of New York, 397 U.S. 664 (1970)	9
Welsh v. United States, 398 U.S. 333 (1970)	8
Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990)	2
Wisconsin v. Yoder, 406 U.S. 205 (1972)	9
Zorach v. Clauson, 343 U.S. 306 (1952)	9
CONSTITUTIONAL AND STATUTORY PROVISIONS	
U.S. Const. Amend. I	9
National Labor Relations Act, § 19, 29 U.S.C. § 169	*passim*
Civil Rights Act of 1964, 42 U.S.C. § 2000e(j)	7
MISCELLANEOUS	
126 Cong. Rec. (1980)	7
17 *Weekly Compilation of Presidential Documents: Administration of Jimmy Carter*, 2856 (1981)	8

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INTEREST OF THE AMICUS CURIAE

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church (hereinafter "Church"). Worldwide the Church has more than 6.6 million members, with some 760,000 in the United States.

For more than a century—many years before the first significant federal labor laws were enacted—the Church has taught its members to avoid entangling alliances through joining and financially supporting labor organizations, or working for oppressive employers. The Church bases these teachings on texts of Scripture that indicate Christ is to be the Lord of

one's life and the ultimate authority to which a believer will submit all decisions and relationships.

Beginning in 1965, the Church actively petitioned the Congress of the United States for an exemption from the membership and financial support requirements of the National Labor Relations Act. The Church's efforts were rewarded when Congress enacted a Conscience Clause permitting religious dissenters—in lieu of membership in, or financial support of a labor union—to pay a union dues equivalent to a neutral charity. See Section 19 of the National Labor Relations Act, 29 U.S.C. § 169.

The Sixth Circuit declared the Conscience Clause an unconstitutional establishment of religion. *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990). In so doing, that court frustrated 15 years of legislative efforts by the Church to obtain an accommodation for its members from oppressive federal labor laws. Once the Church could have argued that federal labor law requiring membership in or financial support of a labor organization violated the free exercise clause of the first amendment under the three-part free exercise test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963). This Court, however, removed that protection in *Employment Div. of Oregon v. Smith*, 110 S. Ct. 1595 (1990). Unless the Sixth Circuit's decision is reversed, members of the Church will be forced to make the cruel choice between their livelihood or their religion.

The Church seeks to inform the Court of its role in the passage of Section 19 and to argue the constitutionality of that Section. Without the protection of Section 19, members of the Church will face re-

ligious discrimination in the work place imposed by a federal law without an adequate remedy.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Sixth Circuit opinion places in jeopardy legislative and judicial accommodations of religious beliefs and practices. Failure to reverse or otherwise limit that opinion will result in an erosion of other free exercise protections.

There are two valid reasons to question the Sixth Circuit's opinion. First, when Congress creates a burden on religious belief and practice, it can also provide the means to relieve such a burden. Efforts by the Church to obtain a legislative accommodation on behalf of its members through the enactment of a Conscience Clause to the NLRA is consistent with this principal and with this Court's decision in *Employment Div. of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

Second, Section 19 of the NLRA can be construed so as to save it from an establishment of religion challenge. Such a construction would expand the religious exemption to include anyone who for personal religious reasons refuses to join or financially support a labor organization.

ARGUMENT

I. The Conscience Clause Sought a Legislative Accommodation for Religious Dissenters to Burdens Created by Federal Labor Laws

Since 1965 the Seventh-day Adventist Church has worked with other religious groups, Congress and labor organizations to obtain Conscience Clause protection for its members from certain provisions of the

National Labor Relations Act (NLRA). The Church's first major involvement with Congress was during efforts to repeal Section 14(b) of the NLRA. Representative Edith Green of Oregon championed the cause in the House of Representatives, while Senator Wayne Morse of Oregon did so in the Senate. Their "Conscience Clause" sought to protect members of the Seventh-day Adventist Church and certain other religious groups who—for religious reasons—could not join or financially support a labor union.

In 1974, Congress expanded the coverage of the NLRA to include not-for-profit hospitals. Responding to efforts by the Church on behalf of its members, Congress added a Conscience Clause. The religious exemption was limited to an "employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body or sect which has historically held conscientious objections to joining or financially supporting labor organizations." 29 U.S.C.A. Sec. 169. Six years later, Congress expanded this exemption to protect all employees covered by the NLRA. The Church actively pursued this legislative solution and played a central role in securing the enactment of the Conscience Clause as an accommodation for its members.

Sponsors of the Conscience Clause never intended to exclude from its protection unaffiliated persons whose personal religious beliefs prevented their joining or financially supporting labor organizations. However, respecting the fears of organized labor that less restrictive language would be abused by "free riders" without religious beliefs, no objection was made to the membership requirement.

The Church used the political process to obtain a religious accommodation for its members. This Court, in *Employment Div. of Oregon v. Smith*, 110 S.Ct. 1595 (1990), expressly permitted such a remedy. Justice Scalia, writing for the majority, directed those seeking protection of religious beliefs to the legislative process, observing: "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 110 S. Ct. 1595 at 1606. Absent the protections once afforded by the "compelling state interest test" of *Sherbert v. Verner*, 374 U.S. 398 (1963) the Church must now rely on legislative solutions to legislatively created religious conflicts.

Of course, the idea of government accommodating a person's religious beliefs and practices from burdens created by the government is not new to this Court, nor was it first articulated in *Smith*. In his concurring opinion in *Sherbert*, Justice Stewart stated:

> I think that the guarantee of religious liberty embodied in the Free Exercise Clause *affirmatively requires* government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our constitution commands the positive protection by government of religious freedom-not only for a minority, however small—not only for the majority, however large—but for each of us. (Emphasis added.)

374 U.S. 398 at 415, 416 (1963).

Justice Harlan's dissent in *Sherbert* expressed a similar theme:

> [I]t would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant [who had been denied unemployment compensation because her religious beliefs prevented her from accepting work on Saturday, her Sabbath] . . . There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism.

374 U.S. 398 at 422.

The union security provisions of the NLRA impose a burden on persons who, for religious reasons, cannot join or financially support a labor organization. Having created the burden, there exists no reason why the government cannot act—indeed, it should do so affirmatively—to legislate an accommodation for such a person.

II. If Wilson's Beliefs Against Financially Supporting a Labor Organization are Truly Religious the Court Should Interpret Section 19 so as to Find it Constitutional

Section 19 served as a legislative solution to the needs of the Seventh-day Adventist Church and a handful of other religious groups that sought an accommodation to a federally created infringement of their free exercise rights. In this case, Wilson's refusal to join a union was based upon *personal* religious beliefs rather than the teachings of an organized re-

ligion of which he was a member. The Sixth
denied Wilson's effort to extend the protecti
Section 19 to include himself. It also found the
Section unconstitutional as an establishment
gion.

The Supreme Court can save Section 19 fr
tablishment of religion arguments by construi
language to avoid the constitutional concerns. S
different constructions are possible, any one of
would preserve the constitutionality of Secti
Indeed, to strike the Conscience Clause fro
NLRA on establishment grounds would contin
"crabbed" reading of the establishment clause
this Court has roundly condemned. *See Lynch v*
nelly, 465 U.S. 668, 687 (1984), and *Meek v. Pitt*
421 U.S. 349, 386 (1975) (Chief Justice Burge
curring in the judgment and dissenting in par

First, the legislative history of Section 19 d
strates that neither Congress nor the Presid
the United States intended to establish a relig
show a religious preference. Congressman Tho
who sponsored the legislation explained that the
bership requirement sought to prevent the exe
from being abused by unscrupulous persons as a
busting device. He also contended that paymen
dues equivalent would constitute a reasonable
modation under Section 2000e(j) of the Civil
Act of 1964. 126 Cong. Rec. H760 (daily ed. Fe
11, 1980).

President Carter, in signing the bill, stated:

> I want to emphasize that the language in th
> bill defining conscientious objection is *not*
> be construed in such a way as to discrimina

> among religions or to favor religious views over other views that are constitutionally entitled to the same status.

17 *Weekly Compilations of Presidential Documents: Administration of Jimmy Carter*, 2856 (1981). Clearly, the language was intended to serve as an accommodation under Title VII and to prevent union-busting activities. Neither Thompson nor President Carter intended Section 19 to be an establishment of a particular religion.

Another construction is suggested in *Welsh v. United States*, 398 U.S. 333 (1970). Faced with an exemption from military service for those who had a belief in a "Supreme Being," this Court expanded the definition of "Supreme Being" to include within the exemption those persons with strongly-held philosophical beliefs "akin to a belief in a supreme being" who were opposed to military service. Here, the membership requirements of Section 19 could be read to include personal religious beliefs held with the same sincerity as one who is a member of an organization described in this Section.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court considered whether the National Labor Relations Board had jurisdiction over teachers in religious schools. Relying on Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 Cranch 64, 6 U.S. 64 (1804), that an act of Congress ought not be construed to violate the Constitution if any other possible construction remains possible, the Court avoided the constitutional dilemma by concluding that Congress did not intend to include church school teachers within the Board's jurisdiction. The intent of Congress in enacting Sec-

tion 19 could be construed to include all persons who have personal religious reasons against joining or financially supporting a labor organization. Such a construction, would save Section 19 from establishment of religion charges.

In yet another construction, the Court could find that the questioned language of Section 19 is a permissible preference of one religion over another. In *Larson v. Valente*, 456 U.S. 228, 246-248 (1982), the Court suggested that denominational preferences can be validated if there exists a compelling governmental interest. While any such statute must be closely fitted to further that interest, the accommodation of a free exercise right burdened by federal law represents such a compelling governmental interest.

The Supreme Court itself has on several occasions approved the concept of accommodating the free exercise of religion. See *Zorach v. Clauson*, 343 U.S. 306 (1952); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Gillette v. United States*, 401 U.S. 437 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *United States v. Lee*, 455 U.S. 252 (1982). The Court has even accommodated the free exercise of religion in circumstances where tension existed between the Free Exercise and Establishment Clauses of the first amendment. See *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970).

Justice O'Connor, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), suggests one last saving construction of Section 19. She acknowledges the tension between the free exercise and establishment of religion clauses. She rejects, however, the notion of "complete neutrality" in the government's relationship toward religion. Instead, O'Connor seeks to identify workable

limits to the government's interest in promoting the free exercise of religion. Thus:

> [G]overnment pursues Free Exercise Clause values when it lifts a governmental burden on the free exercise of religion . . . It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden.

472 U.S. 38, 83. Under such a construction, Section 19 properly promotes the free exercise of religion by removing a burden imposed by Congress on certain religious practices.

Section 19 is not an establishment of religion. Rather, it is a congressional effort to lift a burden placed on religious belief and practice by Congress itself. Section 19 can be construed by this Court in a manner to save the statute from claimed constitutional infirmities.

CONCLUSION

The Seventh-day Adventist Church played a central role in securing the passage of Section 19. While it sought protection for all persons with religious objections to joining or financially supporting a labor union, the final legislation was more narrowly focused.

The Church asks this Court to save Section 19 from constitutional attack. This can be accomplished by finding Section 19—as permitted by *Employment Div. of Oregon v. Smith*—a permissible political solution to the need for an accommodation of a federally created religious infringement. Alternatively, the language of Section 19 can be construed to include all persons

who have religious convictions against membership in or financial support of a labor organization.

The General Conference of Seventh-day Adventists respectfully requests that this Court issue a Writ of Certiorari.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. "THICKNESS" IS NOT A CRITERIA FOR COURT REVIEW 1

II. THIS CASE IS IMPORTANT TO THE THOUSANDS OF EMPLOYEES WHO SHARE MAURICE WILSON'S RELIGIOUS BELIEFS 3

III. SECTION 19 IS AN IMPORTANT PART OF THE CONGRESSIONAL SCHEME TO PROTECT RELIGIOUS FREEDOM WHICH HAS NOT BEEN ECLIPSED BY THE CIVIL RIGHTS ACT 5

A. The Section 19 amendment post dates the Title VII amendments 5

B. Section 19 promotes accommodation and limits litigation 6

C. Section 19 gives religious objectors notice of their rights 8

D. The judiciary has historically held Title VII and the NLRA to be distinct 8

IV. THIS ISSUE WILL NOT COME BEFORE THE APPELLATE COURTS AGAIN 9

TABLE OF CONTENTS - CONTINUED

Page

V. THE SOLICITOR DOES NOT ADDRESS THE ISSUE OF HOW TO APPROPRIATELY REMEDY THE CONSTITUTIONAL DEFECT IN SECTION 19 10

CONCLUSION 10

ADDENDUM

A. Decision dated May 11, 1989, from Bernard Gottfried, Regional Director, NLRB, to Linda Douglass, refusing to issue a Complaint in *E & L Transport Co.*, with attached Summary Report 1a

B. Letter dated October 4, 1989, from Joseph E. DeSio, Acting General Counsel, NLRB Office of Appeals, denying Appeal in *E & L Transport Co.* 5a

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 9

Chicago Teachers Union, Local 1 v. Hudson,
475 U.S. 292 (1986) 8

E & L Transport, No. 7-CA-28939 (1989) 9

Grant v. Spellman, 99 Wash. 2d 815,
664 P.2d 1227 (1983) 5

NLRB v. Raytheon Co., 398 U.S. 25 (1970) 3

Scandia Log Homes, 258 N.L.R.B. 716 (1981) 6

TWA v. Hardison, 432 U.S. 63 (1977) 7

Yott v. North American Rockwell Corp.,
602 F.2d 904 (9th Cir. 1979) 6

Statutes

National Labor Relations Act

29 U.S.C. § 160(f) 3

29 U.S.C. § 164(b) 4

29 U.S.C. § 169 . . . . . *passim*

Title VII, Civil Rights Act of 1964

42 U.S.C. §§ 2000(e) *et seq.* . . . . . *passim*

TABLE OF AUTHORITIES - CONTINUED

Page

42 U.S.C. § 2000e(j) 7

Alaska Stat.

§ 23.40.225 (Supp. 1987) 4

§ 42.40.880 (Supp. 1987) 4

Cal. Gov't Code

§ 3502.5(a) (West 1988) 4

§ 3515.7 (West 1988) 4

§ 3546.3 (West 1988) 4

Haw. Rev. Stat.

§ 89-3.5 (1985) 4

§ 377-4.5 (1985) 4

Ill. Ann. Stat. ch. 48

para. 1606 § 6(g) (Smith-Hurd 1986) 4

para. 1711 § 11 (Smith-Hurd 1986) 4

Mont. Code Ann. § 39-31-204 (1987) 4

Ohio Rev. Code Ann. § 4117.09(C)
(Anderson 1987 Supp.) 4

Or. Rev. Stat. § 243.666 (1987) 4

TABLE OF AUTHORITIES - CONTINUED

Page

Pennsylvania -

Title 43 ch. 19 § 2215(h) (1988 CCH Public Employee Bargaining ¶ 27,417) 4

Wash. Rev. Code Ann.

§ 28B.52.045(3) (1988) 4

§ 41.59.100 (1988) 4-5

§ 47.64.160 (1986) 5

Wis. Stat. Ann. § 111.85(d) (West 1988) 5

Miscellaneous

126 Cong. Rec. 2580 (1980) 5

126 Cong. Rec. 2581-82 (1980) 6

126 Cong. Rec. 2584 (1980) 7

126 Cong. Rec. 34007 (1980) 4

Hon. F. M. Vinson, Speech before the American Bar Ass'n titled "Work of the Federal Courts" (Sept. 7, 1949), 69 S. Ct. V. 2

"Yearbook of American & Canadian Churches" (Abingdon Press 1990) 4

ARGUMENT

I. "THICKNESS" IS NOT A CRITERIA FOR COURT REVIEW.

The Solicitor General:

1. agrees that this case presents "a difficult question of constitutional law" (Opp. brf. 8);

2. admits that Justice previously took the same position on the constitutional issues as the Petitioner does here (Opp. brf. 13 n.9); and,

3. admits that this is the type of case which normally warrants review (Opp. brf. 14).

Despite this, the Solicitor argues that this case presents the "rare instance" (Opp. brf. 8) where the normal considerations should be set aside because the damage to Mr. Wilson's religious freedom is "thin and insubstantial." (Opp. brf. 17)

Thickness and sturdiness may be criteria for being accepted into the National Football League, but they do not correspond to any known criteria for acceptance by this Court.

What the Solicitor means by this, in terms of traditional legal argument, is unclear. At one point in his brief he apparently records all of his random thoughts about whether this case is moot. (Opp. brf. 14-16) However, he concludes (rightly) that this case is not moot. (Opp. brf. 16) He seems to argue that his discarded thoughts on mootness make the case "thin."

While presenting his discarded thoughts on mootness, the Solicitor makes reference to matters outside the record which tend to make it appear that the Petitioner, Maurice Wilson, did not suffer serious adverse consequences because of the clash between the union's demands and his conscience. The suggestion is that other, subsequent proceedings taken pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000(e) *et seq.*)

protected Mr. Wilson. This apparently disqualifies the case from being "sturdy."

Whatever the precise legal meaning of the Solicitor's "thickness" argument, his obvious intent is to signal that the specific personal injuries and wrongs claimed by Maurice Wilson are not worth the Court's time.[1]

This Court takes cases to chart the course of the law and to exercise its supervisory authority over lower courts. It does not take civil cases just to fix the cuts and bruises of a particular petitioner. As a former Chief Justice has noted:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those [who file successful petitions] will know, therefore, that you are, in a sense, prosecuting or defending class actions; .... What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations.[2]

---

[1] Mr. Wilson has a concrete interest in this case. Since the Solicitor makes assertions based on extra-record facts, the extra-record reply is that the facts and the incident which gave rise to this litigation were never the subject of any Title VII charge. Mr. Wilson was not aware of Title VII remedies and he did not contact counsel until the limitations period had long run. But even if he were aware of Title VII at the time of the events in this case, Section 19, as shown *infra*, provides protection for religious objectors that is simply not available under Title VII.

[2] Speech by the Honorable Fred M. Vinson, Chief Justice, on the "Work of the Federal Courts," before the American Bar Association, September 7, 1949, found in 69 S. Ct. V, VI.

A decision by a lower court to declare part of the nation's basic labor law unconstitutional is precisely the kind of case that this Court takes—a fact the Solicitor acknowledges. (Opp. brf. 14)

Even the litigation before the National Labor Relations Board (Board) transcended the parochial interests of Maurice Wilson. The Board's primary responsibility is to protect the *public interest*. *NLRB v. Raytheon Co.*, 398 U.S. 25, 28 (1970). Therefore, from the day the Board ruled Mr. Wilson ineligible for a religious exemption to the day the appeals court struck down Section 19, this case has been freighted with public interest.

II. THIS CASE IS IMPORTANT TO THE THOUSANDS OF EMPLOYEES WHO SHARE MAURICE WILSON'S RELIGIOUS BELIEFS.

The decision of the court below judicially eliminated the only provision of the nation's basic labor law which even purports to protect religious minorities. Wherever Mr. Wilson finds a job in the future, he is forever barred from claiming protection for his religious[3] beliefs under Section 19 (29 U.S.C. § 169).

More important to this Court's supervisory powers is the fact that hundreds of thousands of employees who hold religious

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[3] Amicus Council On Religious Freedom makes the frivolous suggestion that Mr. Wilson's beliefs are not religious. Apparently the Council has not looked at the record. The administrative law judge found Mr. Wilson's beliefs to be religious (Pet. App. 20a), the National Labor Relations Board agreed (Pet. App. 14a, n.1), as did the court below (Pet. App. 1a-2a & n.1), and the Solicitor concurs (Opp. brf. 14-15). Even the most cynical observer reading Mr. Wilson's "Statement of Christian Convictions" (R. II, Jt. exhs. 5 & 7) would conclude that his beliefs are religious. Furthermore, the Council has badly confused the law on standing when it suggests that the nature of Mr. Wilson's beliefs affects his standing. His standing, which is undisputed by the parties, comes from 29 U.S.C. § 160(f) ("[a]ny person aggrieved by a final order ... may obtain a review"). Disputes over the nature of his religious beliefs go only to the merits of the exemption case.

beliefs similar to Mr. Wilson's will also be barred from using the religious accommodation provision which Congress wrote into the National Labor Relations Act (NLRA).

While the exact number of the employees affected is not known, some conclusions about the extent of the problem are possible. The congressional debate over Section 19 mentioned several religious denominations which specifically teach their members not to support labor unions. These included the Seventh-day Adventists and certain Amish and Mennonite groups. (126 Cong. Rec. 34007 (1980) (remarks of Sen. Melcher))

The amicus brief filed by the General Conference of Seventh-day Adventists states that it has 6.6 million members, 760,000 of whom currently reside in the United States. The 1990 edition of the "Yearbook of American & Canadian Churches" 252 (Abingdon Press) shows a membership of 92,682 for the Mennonite Church and 68,040 for the Old Order Amish Church. Of course, the number of employees who, like Mr. Wilson, hold personal religious beliefs against supporting unions is unknown. From these statistics it is reasonable to assume that at least 1 million are potentially affected by the demise of Section 19.

Twenty-one states have passed Right to Work laws (pursuant to 29 U.S.C. § 164(b)) and twenty-nine have not. Of the twenty-nine states that have not passed a Right to Work law, ten have enacted state statutes which are patterned after Section 19 and which cover public employees.[4] The fate of these state statutes

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[4] *Alaska* - Alaska Stat. § 23.40.225 (Supp. 1987), Alaska Stat. § 42.40.880 (Supp. 1987); *California* - Cal. Gov't Code § 3546.3 (West 1988), Cal. Gov't Code § 3515.7 (West 1988), Cal. Gov't Code § 3502.5 (a) (West 1988); *Hawaii* - Haw. Rev. Stat. § 377-4.5 (1985), Haw. Rev. Stat. § 89-3.5 (1985); *Illinois* - Ill. Ann. Stat. ch. 48, para. 1606 § 6(g) (Smith-Hurd 1986), Ill. Ann. Stat. ch. 48, para. 1711 § 11 (Smith-Hurd 1986); *Montana* - Mont. Code Ann. § 39-31-204 (1987); *Ohio* - Ohio Rev. Code Ann. § 4117.09(C) (Anderson 1987 Supp.); *Oregon* - Or. Rev. Stat. § 243.666 (1987); *Pennsylvania* - Title 43 ch. 19 § 2215(h) (1988 CCH Public Employee Bargaining ¶ 27,417); *Washington* - Wash. Rev. Code Ann. § 28B.52.045(3) (1988), Wash. Rev. Code Ann. § 41.59.100

(other than the Washington statutes)[5] and the public employees protected by them is also caught up in the fate of this case.

Instead of this case being "thin and insubstantial," as the Solicitor suggests, it is fat with the number of religious objectors and state statutes which are riding on its fate.

III. SECTION 19 IS AN IMPORTANT PART OF THE CONGRESSIONAL SCHEME TO PROTECT RELIGIOUS FREEDOM WHICH HAS NOT BEEN ECLIPSED BY THE CIVIL RIGHTS ACT.

While the Solicitor's "thinness" argument is a muddle of extra-record facts whose legal significance is unclear, the subtle message is that this Court should allow Maurice Wilson and Section 19 to sink slowly and irretrievably under the waves because Title VII of the Civil Rights Act protects Mr. Wilson and all other religious objectors like him. This subtle message is not accurate. For at least three reasons, Section 19 has not been eclipsed by the religious discrimination provisions of Title VII.

A. The Section 19 amendment post dates the Title VII amendments.

The Solicitor's suggestion baldly ignores the legislative facts. The 1980 amendment to Section 19 at issue ***followed***, not preceded, the 1972 religion amendments to Title VII. Congress looked at what it had done in Title VII for religious objectors,[6] it looked at how the Courts were handling religious objectors

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(1988), Wash. Rev. Code Ann. § 47.64.160 (1986); *Wisconsin* - Wis. Stat. Ann. § 111.85(d) (West 1988).

[5] One Washington statute has been broadly construed by its Supreme Court to avoid the very constitutional problem presented here. *Grant v. Spellman*, 99 Wash. 2d 815, 664 P.2d 1227 (1983).

[6] 126 Cong. Rec. 2580 (1980) (remarks of Rep. Hinson).

under Title VII[7] and it decided to amend the NLRA to clarify and improve the path for religious objectors—as described next.

B. Section 19 promotes accommodation and limits litigation.

One advance for religious objectors (and advantage for the judiciary) created by Section 19 is that it forces accommodation at the point of bargaining the union security clause and does not dump the controversy in federal district court after the religious objector has been discharged. Section 19 requires each collective bargaining agreement containing a union security clause to specifically apprise religious objectors of their right to an accommodation. Section 19 provides in pertinent part, "Any employee ... [holding] conscientious objections ... shall not be required to join or financially support any labor organization ... *except* [where the accommodation is set forth in the contract]." (emphasis added)

This language, in the view of the Board, completely releases religious objectors from the obligation to pay any union fees at all unless the collective bargaining agreement specifically sets forth an accommodation for them. *Scandia Log Homes*, 258 N.L.R.B. 716, 719 (1981).

Therefore, if the employer and union do not include in their bargaining over the union security clause a provision for religious objectors, the objector pays nothing. This is a powerful tool to compel the employer and union to agree to accommodate. Title VII has no parallel provision, and no court has ever held under Title VII that a reasonable accommodation for religious objectors is that they pay nothing. In fact, one court has held just the opposite. *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 906-07 (9th Cir. 1979).

Section 19 not only pressures the parties to the collective bargaining agreement to accommodate religious objectors, it

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[7] *Id.* at 2581-82 (1980) (remarks of Rep. Clausen).

forces them to deal with the specific terms of the accommodation. Unlike Title VII, Section 19 does not leave the reasonable accommodation open for litigation and dispute by the parties. The employer and the union are to include in the collective bargaining agreement the three charities from which the employee can choose to pay the union fees. (In the absence of such a designation, the religious objector gets to choose.) Section 19 provides:

> [The] employee may be required ... to pay ... to a nonreligious, nonlabor organization charitable fund ... chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee.

It was for these reasons that Representative Erlenborn promoted the 1980 amendment to Section 19 by saying, "This bill [which became Section 19] will ... hopefully, reduce the financial burden on those conscientious objectors who must go to court to enforce their rights."[8] He also said, "[a]ccommodation can be more rapidly achieved through congressional action than through costly and protracted court litigation."[9]

Section 19 also improves upon Title VII by eliminating the undue hardship controversy that is a standard defense in religious discrimination litigation under Title VII. *See, TWA v. Hardison*, 432 U.S. 63 (1977); *compare* 29 U.S.C. § 169 with 42 U.S.C. § 2000e(j). Section 19 does not provide for an undue hardship defense. Normally, the union representing the religious objector incurs no additional bargaining expense simply because the objector is in the bargaining unit. An exception to this rule occurs when the union is required to file a grievance specifically for the religious objector. Section 19 eliminates this potential

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[8] 126 Cong. Rec. 2584 (1980).

[9] *Id.*

hardship by making the objector reimburse the union for the reasonable cost of filing a grievance on his behalf. ("If such employee ... requests ... to use the grievance-arbitration procedure ... the labor organization is authorized to charge the employee for the reasonable cost ....")

From this it is clear that Section 19 is not eclipsed by Title VII. It is a decided improvement over Title VII in that it avoids the expensive and time-consuming litigation usually needed to wrestle out the accommodation and undue hardship questions.

C. Section 19 gives religious objectors notice of their rights.

Under Title VII, notices advising employees of their rights are posted only after litigation has been brought and the employer or union has either informally conceded the point or lost the point before a court. As noted above, Section 19 pressures the employer and union to specifically provide for the accommodation in the employees' contract.

The requirement that the employer and union affirmatively inform religious objectors through the collective bargaining agreement of their right to pay to a charity, or waive the right to force any payment, is an important right that does not exist under Title VII and cannot be found in any reported Title VII decision. This "inform or waive" requirement is consistent with the analogous instruction by the Supreme Court in *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 306-07 (1986) that employers and unions must provide nonunion employees with information about their rights in relation to compulsory union fees.

D. The judiciary has historically held Title VII and the NLRA to be distinct.

The idea that Title VII could override or eclipse a portion of the NLRA is contrary to well-established precedent. The consistent pattern of the federal courts is to hold that Title VII and the NLRA provide separate and independent rights to

employees. An employee has the right to independently pursue his rights under both Title VII and the NLRA. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-50 & n.9 (1974).

IV. THIS ISSUE WILL NOT COME BEFORE THE APPELLATE COURTS AGAIN.

The Solicitor argues that this Court should wait to review the grave constitutional issues raised by Section 19 until the issue arises again (in a presumably "fatter" case) from another court of appeals. (Opp. brf. 19) The Solicitor argues this could happen if an employer, relying on Section 19, refused to discharge a religious objector *and* the union filed a charge with the NLRB *and* the General Counsel of the NLRB issued a complaint *and* the employer lost *and* the employer (or employee) filed an appeal *and* the appeals court made a decision *and* a petition was brought before this Court.

The short answer to all of these "*ands*" is, "Why would an employer refuse to discharge the objector in the first place?" With the Board's precedent clear, and with the adverse decision of the court below, an employer would have no motive to spend money on a fight that he knew he would lose before the Board. Furthermore, if the Board sought to protect its decision by refusing to issue a complaint against the employer, that decision is completely unreviewable. (See discussion in Pet. at 7.)

The only logical way in which this case could arise again would be based on an employee's unfair labor practice charge. The Board's decision in this case stands as a barrier to issuing complaints for religious objectors like Wilson. *E & L Transport*, No. 7-CA-28939 (1989) (decision reproduced in the addendum).

As a practical matter, this is the first and last time that the question of the constitutionality of Section 19 will come before this Court.

V. THE SOLICITOR DOES NOT ADDRESS THE ISSUE OF HOW TO APPROPRIATELY REMEDY THE CONSTITUTIONAL DEFECT IN SECTION 19.

The Solicitor notes that one of the issues before this Court is "[w]hether, if Section 19 were found to be unconstitutional, the provision should be nullified, rather than extended to all employees having a religious objection to joining or supporting unions." (Opp. brf. 1) He does not address that question or suggest how the congressional mandate can be salvaged. Petitioner and Amici argue that the traditional remedy for salvaging unconstitutional, underinclusive statutes is extension, not nullification. (Pet. 18-20) If Petitioner is correct, this Court can save Section 19 and continue the protection for those religious minorities that Congress unquestionably sought to protect.

CONCLUSION

This case is the "last train out of Dodge" for Section 19. If this Court does not review this case now, it is highly improbable that the validity of Section 19 will ever come before this Court. Properly construed, Section 19 is a powerful congressional tool for protecting the religious beliefs of employees. If the decision below stands, this powerful congressional tool will be lost to religious objectors.

Respectfully submitted,

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June 5, 1991

ADDENDUM

[Logo omitted in printing]

United States Government

NATIONAL LABOR RELATIONS BOARD

Region 7

477 Michigan Avenue - Room 300

Detroit, MI 48226-2569

May 11, 1989

Linda Douglass
3369 Will Carleton Road
Flat Rock, MI 48134

Re: E & L Transport Co.
Case No. 7-CA-28939

Dear Ms. Douglass:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A written summary report of the basis for my conclusions is attached hereto.

Please refer to enclosed Form NLRB-4938 as to the procedure and deadline for filing an appeal of my dismissal action.

Very truly yours,

/s/

Bernard Gottfried
Regional Director

RK/eas

Enclosures: Form NLRB-4767
"Notice of Appeal"

Form NLRB-4938
"Procedure for Filing an Appeal"

(SEE ATTACHED SHEET)

RE: E & L Transport Co.
Case No. 7-CA-28939

SUMMARY REPORT

The charge in the above captioned matter alleged that the Employer violated Section 8(a)(2) and (3) of the National Labor Relations Act (the Act) by its refusal to honor the request of Linda Douglass, the Charging Party, pursuant to Section 19 of the Act, that she not be required to pay dues to Local 299, Teamsters Union.

The investigation established that commencing in June, 1988, the Charging Party requested of the Employer that she be allowed to withdraw her membership in the Teamsters, Local 299 because of her religious objections to the joining or funding of labor organizations. The Employer did not honor her request and instead continued to deduct the Union dues and remit them to the Union. The Charging Party claimed that her membership in the Christian Auto Workers (CAW) formed the basis for her Section 19 claim. The investigation established that the CAW was an organization of relatively recent origin, beginning in approximately 1977. Furthermore, at the time that the Charging Party made her Section 19 request to the Employer, the Charging Party was the only member of the CAW and was the first employee to claim membership in the CAW as a basis for the Section 19 claim. The investigation established that the CAW acts more as a support framework for people who object to union membership but are members of religions which do not hold as a basic tenet that their membership cannot join or fund labor organization or for employees who have personally held religious beliefs, irrespective of any membership in an organized religion, that they cannot join or fund labor organizations. Based on such, it cannot be established that the CAW is a bona fide "religion, body, or sect" within the meaning of Section 19 of the Act such that the membership in it would lead to a viable claim under Section 19. (Grand Rapids City Coach Lines 293 NLRB No. 62 (1989).

An additional issue is whether a personally held religious belief irrespective of membership in a religion, body or sect that one should not join or fund a labor organization can be used to invoke Section 19. The language of Section 19 states that to invoke the section, the employee must be a member of a "religion, body or sect". The language of the statute focuses on the membership of the employee as a prerequisite for the application of the provisions of Section 19. Therefore, no matter how sincerely felt, personally held convictions that one cannot join or fund labor organizations where those convictions do not arise out of the employee's membership in a legitimate Section 19 "religion, body or sect" cannot be used as a basis for a Section 19 claim. Ibid

Based on the above, the charge in the instant matter is dismissed.

[Logo omitted in printing]

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

October 4, 1989

Re: E & L Transport Co.
Case No. 7-CA-28939

Ms. Linda Douglas
3359 Will Carleton Road
Flat Rock, Michigan 48134

Dear Ms. Douglas:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned case has been carefully considered.

The appeal is denied substantially for the reasons set forth in the Summary Report attached to the Regional Director's letter of May 11, 1989.

Very truly yours,

Joseph E. DeSio
Acting General Counsel

By /s/
Mary M. Shanklin, Director
Office of Appeals

cc: Director, Region 7
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Supreme Court, U.S.
FILED
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No. 90-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	1
A. Summary of Facts	1
B. Summary of Legislative History	2
SUMMARY OF ARGUMENT	13
ARGUMENT	14
I. A BURDEN IMPOSED BY CONGRESS ON RELIGIOUS BELIEF AND PRACTICE CAN BE RELIEVED BY CONGRESS CONSISTENT WITH THE ESTABLISHMENT CLAUSE	14
II. ESTABLISHED PRINCIPLES OF JUDICIAL REMEDY REQUIRE THE CONTINUATION OF THE PROTECTION AFFORDED THROUGH AN EXTENSION OF THE LEGISLATIVE EXEMPTION	17
III. WILSON LACKED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 19	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:	Page
Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978)	15
Califano v. Wescott, 443 U.S. 76 (1979)	18
Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976)	10
Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987)	16
Estate of Thornton v. Caldor, 472 U.S. 703 (1985)	17
Gillette v. U.S., 401 U.S. 437 (1971)	12,18
Iowa Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931)	18
McDaniel v. Essex Intern'l Inc., 696 F.2d 34 (6th Cir. 1982)	15
Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445 (7th Cir. 1980)	15
Railway Employes' Dept., AFL-CIO v. Hanson, 351 U.S. 225 (1956)	14
Steele v. L&NR Co., 323 U.S. 192 (1944)	14
Walz v. Tax Commission, 397 U.S. 664 (1970)	12
Wallace v. Jaffree, 472 U.S. 38 (1985)	16
Welsh v. U.S., 398 U.S. 333 (1970)	17
Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990)	2,17
Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982)	19

CONSTITUTIONAL AND STATUTORY AUTHORITIES:

U.S. Constitution, Amendment One	*passim*
Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)(j)	*passim*
National Labor Relations Act, § 19, 29 U.S.C. § 169 (1980)	*passim*
Postal Reorganization Act, 39 U.S.C. § 1209(c)	5
26 U.S.C. § 1402	12

Table of Authorities Continued

	Page
42 U.S.C. § 300a-7	12
OTHER AUTHORITIES:	
Exemption of Religious Objectors From Union Shop Dues Obligations: Hearings Before the Subcomm. on Labor-Management of the House Comm. on Education and Labor, 94th Cong., 2nd Sess. (1976)	9
Negotiating Equality for Postal Employees and Uniformity in Labor Relations: Hearings on H.R. 1282 and H.R. 5312 Before the Subcomm. on Postal Facilities, Mail, and Labor Management of the House Comm. on Post Office and Civil Service, 93rd Cong., 1st Sess. (1973)	5
To Repeal Section 14(b) of the National Labor Relations Act: Hearings on S256 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Works, 89th Cong., 1st Sess. (1965)	3,4
H.R. Rep. No. 1051, 93rd Cong., 2nd Sess. (1974)	7
H.R. Rep. No. 1175, 93rd Cong., 2nd Sess. (1974)	8
H.R. Rep. No. 768, 95th Cong., 1st Sess. (1977)	10
H.R. Rep. No. 496, 96th Cong., 1st Sess. (1979)	10
S. Rep. No. 697, 89th Cong., 1st Sess. (1965)	5
S. Rep. No. 988, 93rd Cong., 2nd Sess. (1974)	8
111 Cong. Rec. (1965)	
H17,936	3
H17,937	5
S26,581	5
120 Cong. Rec. (1974)	
S12,950	7
S13,543	7
H4591	7
H4602-04	7,8

Table of Authorities Continued

	Page
S22,583	8
H22,949-50	8
123 Cong. Rec. (1977)	
H11,901	10
H11,904	10
H11,967-68	10
126 Cong. Rec. (1980)	
H760-61	12
H763	12
H796	12
S11,678	12
S16,615-16	12
17 *Weekly Compilations of Presidential Documents: Administration of Jimmy Carter* (1981)	13
J. Ginsburg, *Some Thoughts on Judicial Authority and Repair of Unconstitutional Legislation*, 28 Cleve. St. L.J. 301 (1979)	18

STATEMENT OF INTEREST

The Council on Religious Freedom is a national nonprofit corporation formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs and who recognize the importance of preserving and promoting the free exercise of religion and oppose encroachment by private or governmental agencies which limits or inhibit the free exercise of religion. The Council on Religious Freedom opposes government burdens on religious practices or government actions requiring an individual to choose between the practice of religion and governmental benefits otherwise available to him.

Both petitioner and respondent, through their respective counsel of record, have consented to the filing of this brief. Their letters of consent accompany this brief.

STATEMENT OF THE CASE

A. Summary of Facts

Thomas A. Ricci, Administrative Law Judge for the National Labor Relations Board, considered a complaint issued upon a charge filed by the Grand Rapids City Coach Lines, Inc. The sole issue presented was whether Local Union 836, Amalgamated Transit Union (hereafter "Union") unlawfully demanded that the company discharge Maurice Wilson, an employee who refused to authorize the company to deduct union dues and initiation fees on his behalf for the Union (*see* Decision of Administrative Law Judge in Appendix to Petition for Writ of Certiorari at 16a-17a).

The union requested the company to discharge Wilson for failure to pay union dues and initiation fees. When the company refused, the union filed a grievance to compel the company to live up to the collective bargaining agreement. While no action was taken on the grievance, the company filed a charge with the NLRB (*id.* at 17a-18a).

Wilson refused to pay the union dues or initiation fees because it was against his personal convictions to join a union or pay its dues. Wilson claimed to be a member of a church called "The Body of Jesus Christ." (*Id.* at 18a). When he first claimed a religious privilege as the basis for his refusal to pay union dues, the union officers, aware of the statutory language of Section 19 of the 1980 amendment to the National Labor Relations Act, asked Wilson to which church or religious organization he belonged. Wilson admitted that the assembly which he attended was "not a denomination of religion organization established by a constitution, or a man" (*id.* at 19a-20a). Although Wilson mentioned the phrase "faith assembly," saying that it was in Warsaw, Indiana, he did not have the address of the group. He also gave the name of a "minister" who had been dead for three years. The union could not locate any such organization in Warsaw, Indiana (*id.* at 20a).

Thereupon, the Administrative Law Judge recommended that the complaint be dismissed (*id.* at 21a).The NLRB adopted the recommended order of the Administrative Law Judge (*see* Decision and Order of the NLRB as set forth in Appendix to Petition for Writ of Certiorari at 13a-15a).

The company took no further action. However, Wilson filed a petition for review of the decision and order with the Sixth Circuit Court of Appeals. That court in *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), found Section 19 to violate the Establishment Clause of the First Amendment. Contrary to Wilson's requested remedy, the court failed to extend the statute to include individuals, such as Wilson, whose refusal to join or pay dues to a labor union was based upon a personal belief and not membership in a religious group which held conscientious objections to joining or financially supporting a labor organization.

B. Summary of Legislative History

The legislative history leading up to the present Section 19 of the NLRA is instructive. In 1965, Congress considered a proposal to repeal Section 14(b) of the National

Labor Relations Act. That section exempted persons from having to financially support labor organizations through membership fees in states where union security provisions were prohibited by state law, so-called "right-to-work" states. *To Repeal Section 14(b) of the National Labor Relations Act: Hearings on S. 256 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Works*, 89th Cong., 1st Sess. 9 (1965) [hereinafter cited as *Senate Section 14(b) Hearings*].

Several religious groups viewed the repeal of Section 14(b) with alarm and as a threat to persons in the right-to-work states who had refused, for religious reasons, to join a union. Responding to these concerns, Congresswoman Edith Green of Oregon sought to exempt such persons from having to join or pay dues to a labor organization. 111 Cong. Rec. H17,936 (daily ed. July 28, 1965).

Congresswoman Green described the plight of persons having religious convictions against joining, paying dues or participating in a labor organization. She identified several religious groups whose members could not in good conscience belong to a labor organization: Seventh-day Adventists, Amish, Mennonites, the Plymouth Brethren and certain bodies affiliated with the National Association of Evangelicals. Green saw the matter as "an issue of conscience." Future supporters of an accommodation of these beliefs would use her phrase in calling for a "Conscience Clause" to the National Labor Relations Act (hereinafter NLRA).

During Senate subcommittee hearings on S. 256, W. Melvin Adams, a clergyman with the Seventh-day Adventist Church, stated that the Church had no position concerning the repeal of Section 14(b). Instead, Adams informed the Senators that a sizable minority of U.S. citizens could *not* join or support labor unions because of religious convictions. He identified several religious groups that had such teachings: Seventh-day Adventists, National

Association of Evangelicals, Mennonites, Plymouth Brethren, Christadelphians, Old German Baptists and Christian Missionary Alliance. *Senate Section 14(b) Hearings, supra*, 243-245.

Adams articulated the Seventh-day Adventist Church's teachings on the matter of membership and/or financial support of labor organizations. Adams described efforts by his Church and the American Federation of Labor to negotiate a "Basis of Agreement" involving the payment of union dues equivalency to a benevolent fund as a resolution of the dilemma faced by Adventists. However, the good intentions had proved ineffective. Adams called for "some kind of federal legislation" to protect these people. *Senate Section 14(b) Hearings, supra*, 261.

Cyril F. Dadd, a representative of the Plymouth Brethren, also petitioned the subcommittee for a religious accommodation. He called for "the incorporation of a conscience clause into the labor law." *Senate Section 14(b) Hearings, supra*, 268.

The testimony of these religious leaders before the Senate subcommittee proved successful. The full Senate Committee on Labor and Public Welfare reported a bill which contained the following language:

> (C) if he has reasonable grounds for believing (i) that such employee has been issued a certificate by the National Labor Relations Board either that he is a member of a religious sect or division thereof, the established and traditional tenets or teachings of which oppose a requirement that a member of such sect or division join or financially support any labor organization, or that, even though he is not a member of such a religious sect or division thereof, *he holds conscientious objections to membership in any labor organization based upon his religious training and beliefs in relation to a Supreme Being involving duties superior to those arising from any human relation*, and (ii) either that such employee has timely paid, in lieu of periodic dues and initiation fees, sums equal to such

> dues and initiation fees to a non-religious charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, designated by the labor organization, or that the labor organization has failed upon request to designate such a fund or waives such payment, or (iii) that such employee has complied with alternative arrangements mutually agreed upon by such employee and such labor organization.

S. Rep. No. 697, 89th Cong., 1st Sess. 9 (1965) (emphasis added).

The Conscience Clause, however, did not survive the 89th Congress. The chair ruled Green's amendment as non-germane in the House of Representatives. 111 Cong. Rec. H17,937 (daily ed. July 28, 1965). A successful Senate filibuster against the repeal of Section 14(b) took with it the Senate's version of the Conscience Clause. 111 Cong. Rec. S26,581 (daily ed. October 11, 1965).

Congress again addressed the Conscience Clause in 1973 during efforts to give postal employees the right to strike and to organize a union shop. Section 1209(c) of the Postal Reorganization Act of 1970 [39 U.S.C.] had guaranteed:

> Each employee of the Postal Service shall have the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.

On April 10, 1973, W. Melvin Adams of the Seventh-day Adventist Church again appeared before a Congressional subcommittee advocating a Conscience Clause for Adventist postal employees from the consequences of the proposed changes to 39 U.S.C. § 1209(c), As before, Adam's testimony referred to other groups that opposed union membership. *Negotiating Equality for Postal Employees and Uniformity in Labor Relations: Hearings on H.R. 1282 and H.R. 5312 Before the Subcomm. on Postal Facilities, Mail, and Labor Management of the House Comm. on Post*

Office and Civil Service, 93rd Cong., 1st Sess. 30 (1973) [hereinafter cited as *Postal Hearings*].

Adams referred to a letter from labor leader George Meany which recognized there existed a need by unions and employers to "accommodate religious objections with regard to union security arrangements." *Postal Hearings*, *supra* 31. Adams justified special legislative protection for religious beliefs as consistent with the Free Exercise Clause of the First Amendment. In support of this argument, he relied on draft law exemptions; state Sunday law exemptions; Amish exemptions from social security and school attendance laws; and Jehovah's Witness exemption from pledging allegiance to the American flag. *Postal Hearings*, *supra* 33. Adams recommended the payment of a "dues equivalent" to a non-union, non-religious charity as the principal components of a Conscience Clause. The National Council of Churches, the National Catholic Welfare Conference, and a Jewish organization joined with Adams in calling for preservation of the existing "open shop" language in the Postal Reorganization Act, or in the alternative, the passage of a Conscience Clause to protect workers requiring a religious accommodation. *Postal Hearings*, *supra* 32.

Both the Senate and the House of Representatives approved bills containing a Conscience Clause. In conference committee, however, the Conscience Clause was deleted and section 1209(c) of the Postal Reorganization Act remained in tact.

Congress next considered the Conscience Clause in 1974. On April 2 the Senate Labor and Public Welfare Committee reported S. 3203, 93rd Cong., 2nd Sess., a bill to amend the NLRA by extending the Act's coverage to nonprofit hospitals. S. Rep. No. 93-766, 93rd Cong., 2nd Sess. (1974). The reported bill did not contain a Conscience Clause. However, during Senate debate on the bill, Senator Sam J. Ervin, Jr., offered a Conscience Clause, exempting persons from the dues and membership provisions of the NLRA who, for religious reasons, refused to join or fi-

nancially support a labor union. In support of his proposal, the Senator used the Seventh-day Adventist Church as illustrative of the problem being addressed. 120 Cong. Rec. S12,950 (daily ed. May 2, 1974). Opposed by Senator Jacob Javits, Ervin's efforts failed. The bill passed the Senate on May 7, 1974 without a Conscience Clause. 120 Cong. Rec. S13,543.

During a House debate on H.R. 13,678, 93rd Cong., 2nd Sess., a bill identical to S. 3203 reported by the House Education and Labor Committee on May 20, 1974 (H.R. Rep. No. 1051, 93rd Cong., 2nd Sess. (1974)) proponents of the Conscience Clause succeeded where the Senate had failed. Congressman John Erlenborn of Illinois called for an accommodation, by way of a Conscience Clause amendment. 120 Cong. Rec. H4591 (daily ed. May 30, 1974). Erlenborn called his amendment the "Religious Freedom Amendment." It allowed the payment of a union dues equivalent to a charity rather than the federal treasury. It was narrowly drawn to "affect only a very small number of people because there are only a few religions that do hold this religious belief. One such religion is the Seventh-day Adventists." 120 Cong. Rec. H4603.

Congresswoman Green of Oregon, the first proponent of a Conscience Clause, spoke in support of the amendment. 120 Cong. Rec. H4603. She identified seven religious groups that taught members not to join or financially support a labor organization. Green expressed concern over the unfairness of forcing an employee to choose between loss of a job or violation of conscience; and reminded the House of other religious accommodations, such as the exemption of the Amish from the Social Security Act; and exemption of those opposed to war from military conscription acts. 120 Cong. Rec. H4604.

Specifically, the Erlenborn amendment provided:

> Sec. 19. An employee of a health care institution who is a member of and adheres to tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or fi-

> nancially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment.

120 Cong. Rec. H4602. It exempted *employees* of not-for-profit hospitals from membership in or financial support of labor organizations. H.R. 13,678, together with Erlenborn's Conscience Clause, passed the House on May 30, 1974, by voice vote. 120 Cong. Rec. 4604.

The Senate and House referred the legislation to a conference committee. The following compromise language was added to the Erlenborn amendment:

> Except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a non-religious charitable fund exempt from taxation under Section501(c)(3) of the Internal Revenue Code chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

See H.R. Rep. No. 1175, 93rd Cong., 2nd Sess. 3 (1974), and the S. Rep. No. 988, 93rd Cong., 2nd Sess. (1974). In addition to minor editorial changes, the Senate receded to the House version containing the Conscience Clause. The amendment to the NLRA was passed by the Senate (120 Cong. Rec. S22,583 (daily ed. July 10, 1974)) and the House (120 Cong. Rec. H22,949 and H22,950 (daily ed. July 11, 1974)). It became Public Law 93-360, 29 U.S.C. § 169.

Supporters of the Conscience Clause continued their efforts on Capitol Hill seeking to extend the exemption of Section 19 to all employees, not just those working for non-profit hospitals. In 1976, Congressman Erlenborn introduced H.R. 1528, 94th Cong., 2nd Sess. (1976), to accomplish this purpose.

A House subcommittee held hearings on July 28, 1976. Chairman Thompson acknowledged that the "problems of accommodating the values of the 'union shop' agreement with the values of religious freedom has been with us for some time." He traced the legislative history of proposed solutions, beginning with the efforts to repeal Section 14(b) of the Taft-Hartley Act in 1965; the Postal Reform Act of 1970; and the health care amendments of 1974. *Exemption of Religious Objectors from Union Shop Dues Obligations: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 94th Cong., 2nd Sess. 1 (1976). [Hereinafter cited as *Religious Objectors Hearings*.]

At the hearings, Representative Erlenborn presented a prepared statement in support of the bill. He once again identified the seven religious groups that had religious problems joining or financially supporting labor unions. People "should not have to choose between their religion and their jobs." *Religious Objectors Hearings*, *supra*, 28. Erlenborn argued that the bill did *not* establish a religion. Rather, it dealt with conscientious objection based on religion. "It seeks to rationalize the constitutional guarantee of freedom of religion and freedom to practice religion and our federal labor laws." *Religious Objectors Hearings*, *supra*, 28-30.

Thompson's own bill (H.R. 3384, 95th Cong., 1st Sess. (1977) provided the vehicle which brought the Conscience Clause expansion before the 95th Congress. The legislation proposed to amend Section 19 of the NLRA by striking the words "of a health care institution" after the words "Any employee," and adding a new sentence at the end: "Proof of such payments must be made on a monthly basis as a condition of continued exemption from the requirement of financial support to the labor organization, subject to such rules and regulations as the Board may prescribe." The House Committee on Education and Labor reported the bill on September 27, 1977. The report described the conflict which existed between a person's religious beliefs and a requirement created by the federal labor laws. H.R.

3384 was to be an accommodation of such beliefs. H.R. Rep. No. 768, 95th Cong., 1 Sess. 2, 5 (1977).

There was widespread support for the bill in the House of Representatives. During floor discussion, Thompson cited members of the Seventh-day Adventist Church as persons whose religious beliefs would be accommodated by the bill. He believed that the legislation "would accommodate the religious beliefs of these persons and thereby reconcile the National Labor Relations Act with Section 701(j) of the Equal Employment Opportunity Act as recently construed in *Cooper v. General Dynamics*, 533 F2d. 163" [5th Cir. 1976]. 123 Cong. Rec. H11,901 (daily ed. November 1, 1977).

It was against this background that the House considered expanding the Conscience Clause exemption to include all employees covered by the NLRA. In so doing, it sought to resolve a suggested conflict between the Civil Rights Act and the NLRA.

Erlenborn observed: "Enactment of this legislation will demonstrate the federal government's abiding concern for the preservation of religious liberty to all those who strictly adhere to the teachings of their religion regardless of how small their numbers." 123 Cong. Rec. H11,904.

Representatives from across the political spectrum joined in supporting the expanded Conscience Clause. The wide support was reflected in the passage of H.R. 3384 by the margin of 400 to 7. 123 Cong. Rec. H11,967 - H11,968. The legislation, however, did not fare as well in the Senate. There it was attached to a controversial labor reform bill and, as had happened to an earlier Conscience Clause, failed to survive a filibuster.

The expanded Conscience Clause amendment to the NLRA was reintroduced in the 96th Congress by Congressman Thompson as H.R. 4774, 96th Cong., 1st Sess. (1979). The full Committee on Education and Labor unanimously reported the bill on September 20, 1979. H.R. Rep. No. 496, 96th Cong., 1st Sess. (1979). The report confirmed the purpose of H.R. 4774: to accommodate an em-

ployee who, because of his religious beliefs, objects to the membership in or financial support of unions. *Religious Objectors Hearings, supra* 2. The bill sought to accommodate those religious beliefs and reconcile the NLRA with Section 701(j) of the Equal Employment Opportunity Act, 43 U.S.C. Sec. 2000e(j).

In addition to removing the phrase "of a health care institution" from Section 19, the amendment added:

> If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

Religious Objectors, supra, 3 (1979). The bill was reported out of the House Education and Labor Committee on October 4, 1979.

Congressman Thompson addressed the House of Representatives in support of the legislation. He described how the bill extended an exception for employees in the health care industry to all employees covered under the NLRA. Thompson explained that the criteria for the exemption was membership in a bona fide religion that had historically held conscientious objections to joining or financially supporting a labor organization. The purpose of this limitation was to prevent the exemption from being used by unscrupulous persons as a union-busting device. He explained that the payment of a dues equivalent would also constitute a reasonable accommodation under Section 701(j) of the Equal Employment Opportunity Act [42 U.S.C.A. §§ 2000e(j)]. 126 Cong. Rec. H760 (daily ed. February 11, 1980).

Congressman Jon Hinson concluded that H.R. 4774 did *not* establish a religion nor favor one religion over another. "It simply allows the 'free exercise' of religion and rationalizes the constitutional guarantee of freedom of religion over federal labor law. By supporting this legislation

we will be endorsing an accommodation to religious conscience not yet found in our court NLRB decisions." 126 Cong. Rec. H761.

Congressman Clausen, supporting H.R. 4774, described the legislation as "the Conscience Clause amendment." 126 Cong. Rec. H761. He observed that: "H.R. 4774 would remove the government from the dubious role of placing a penalty on the person whose religious convictions cause an individual to believe and act differently from a majority of fellow employees who have voted a certain course of action that would cause the religious objector to have to choose between his conscience and economic survival." 126 Cong. Rec. H761.

Thompson confirmed that the legislation was not anti-labor. He stated that if a religious objector asked the union to perform any arbitration services, he would have to pay for such services. 126 Cong. Rec. H763. The House passed the bill under a suspension of the rules on February 12, 1980, by the margin of 349 to 15. 126 Cong. Rec. H796.

Almost ten months later, the Senate had its own opportunity to consider H.R. 4774. Senator John Melcher requested the discharge of the bill from the Senate's Labor and Human Relations Committee. H.R. 4774 was identical to his own bill: S. 1693, 9th Cong., 1st Sess. (1979), which had been introduced in the Senate with 22 co-sponsors. 126 Cong. Rec. S11,678 (daily ed. August 3, 1979). Melcher declared the legislation a religious freedom issue, not a labor issue, and he compared the bill favorably with the Amish social security exemption set out at 26 U.S.C. § 1402; a federal law prohibiting the firing of Roman Catholics who opposed abortions in federally-funded health care facilities, 42 U.S.C. § 300a-7; religiously based exemptions from the draft laws, *Gillette v. United States*, 401 U.S. 437 (1971); and the exemption of church property from taxes, *Walz v. Tax Commission*, 397 U.S. 664. (1970). 126 Cong. Rec. S16,615 (daily ed. December 13, 1980). The bill passed the Senate by a voice vote on December 13, 1980. 126 Cong. Rec. S16,616.

H.R. 4774 became Public Law 96-593, 29 U.S.C. Section 169, when signed by President Carter on December 24, 1980. The President, however, in a statement which accompanied signing of the law, sought to clarify his own understanding:

> In signing H.R. 4774, I want to emphasize that the language in this bill defining conscientious objection is not to be construed in such a way as to discriminate among religions or to favor religious views over other views that are constitutionally entitled to the same status. To put any other construction on this definition would, in my view, create serious constitutional difficulties.

17 *Weekly Compilations of Presidential Documents: Administration of Jimmy Carter*, 2856 (January 2, 1981).

After 15 years of legislative efforts, a Conscience Clause applicable to all workers covered by the NLRA had become a part of the federal labor law of the United States. An accommodation of a person's religious beliefs against membership in or financial support of a labor organization was now assured.

SUMMARY OF ARGUMENT

The record on appeal fails to disclose that Wilson had standing to challenge Section 19 of the NLRA. Nor is there a finding that h objection to the payment of union dues and fees was prompted by religious beliefs held with the same sincerity as those persons identified in Section 19.

The legislative history of the Conscience Clause to the NLRA confirms the congressional intent to lift a burden on the free exercise of religion. Such legislation was necessary because the burden resulted from federal action bearing the imprimatur of the United States Congress.

The legislative history of Section 19 also demonstrates that Congress intended to bring the NLRA into conformity with rights guaranteed by the religious accommodation

provisions of Title VII of the 1964 Civil Rights Act, as amended. The legislative exemption was not designed to discriminate among religions; rather it was narrowly drawn to exclude from the exemption those persons who, for personal, philosophical, or political reasons, would otherwise seek to avoid the union security requirements of a collective bargaining agreement.

Should this Court conclude that Section 19 violates the Establishment Clause because it fails to lift the governmentally imposed burden for all those persons with deeply held religious beliefs who cannot financially participate in union activity, then the Court must act to include those employees in the exemption. Any other remedy would result in a reassertion by judicial fiat of the governmentally imposed burden on the free exercise rights of employees. The inclusion of the additional employees, however, would not be contrary to the legislative will so long as the exemption includes only those who have sincerely held religious beliefs rather than personal, philosophical, or political, objections to union membership.

Argument

I. A BURDEN IMPOSED BY CONGRESS ON RELIGIOUS BELIEF AND PRACTICE CAN BE RELIEVED BY CONGRESS CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

The purpose of Section 19 was not to discriminate between religious denominations nor to provide congressional endorsement for a favored religion. It was, however, narrowly drawn to prevent claims which were not based upon sincere and strongly held religiously based convictions.

Since *Steele v. L&NR Co.*, 323 U.S. 192 (1944), it has been recognized that federal legislation which bestows broad powers on labor unions involves state action. In *Railway Employes' Dept., AFL-CIO v. Hanson*, 351 U.S. 225 (1956), this Court declared that it is the federal government which is the effective force upon the employee in this situation. The collective bargaining agreement has

"the imprimatur of federal law upon it," and "the federal statute is the source of power" by which the right of the individual is "lost or sacrificed." *Id.* at 232.

It is clear from the legislative history that the purpose behind the adoption of Section 19 was to lift a congressionally imposed burden imposed upon a relatively few number of individuals who were members of small religious sects. Representative Clausen, one of the cosponsors of Section 19, in his remarks to the Congress, gave particular attention to three Title VII religious accommodation cases: *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1980), *cert. denied*, 454 1046 (1981); *McDaniel v. Essex Intern'l Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); and *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), *reh'g en banc denied, cert. denied sub nom. International Assoc. of Machinists and Aerospace Workers of America v. Anderson*, 442 U.S. 921 (1979). After summarizing those cases, Rep. Clausen stated:

> The legislative history of the proposed amendment to the National Labor Relations Act indicates that the bill and Title VII were meant to be complimentary. The purpose of the previous bills and the purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the federal courts of appeal ruling on the issue have found to be an accommodation acceptable under Title VII

126 Cong. Rec. - House, H761 (daily ed. Feb. 11, 1980).

The purpose of the legislation was to have the National Labor Relations Act parallel Title VII with reference to religious accommodation as to union membership and the payment of union dues. Congress recognized that it was the government that had limited the religious freedom of those members of religious sects which taught its members that they should not join or pay dues to labor organizations. When government is involved in limiting religious freedom, the government may employ affirmative or exemptory measures to restore that degree of religious free-

dom which had existed without the government involvement. This has been referred to as "legislative free exercise" and can be viewed as the effort by the legislature to overcome hostility to a religion by an act of the state. This Court has recognized that Congress has the power to take some affirmative measure or grant an exemption in order to insure that the religious needs of individuals are satisfied. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987).

In *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985), Justice O'Connor, in discussing the resolution of conflicts that may occur between the Free Exercise and Establishment Clauses of the First Amendment, stated:

> The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *supra*, at 7600, is acquainted with the Free Exercise Clause and the values it promotes.

See also Estate of Thornton v. Caldor, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

II. ESTABLISHED PRINCIPLES OF JUDICIAL REMEDY REQUIRE THE CONTINUATION OF THE PROTECTION AFFORDED THROUGH AN EXTENSION OF THE LEGISLATIVE EXEMPTION.

The court of appeals found Section 19 to be discriminatory and in violation of the Establishment Clause because it "creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute." *Wilson v. NLRB*, 920 F.2d 1282, 1287 (6th Cir. 1990). The court, however, refused to consider Wilson's free exercise claim because the court concluded that "[s]ection 19 does not burden Wilson's practice of his religion." *Id.* at 1290. Of course, the court misses the point. Section 19 was clearly adopted for the constitutionally legitimate purpose of removing a governmentally approved burden on the free exercise of religion and with the correlative purpose of insuring that it would not be misused by employees who did not have a sincere and deep religious conviction that proscribes union membership and financial support.

There is no support in the legislative history of Section 19 or earlier legislative attempts to bestow "special treatment to members of religions having the beliefs described in the statute. . . ." as stated by the court. *Id.* at 1290. At best, the legislation which was to conform the NLRA to Title VII religious accommodation concerns was merely under-inclusive.

The appropriate remedy here would not be to void the legislative will but rather to extend the legislative exemption of Section 19 to all who hold religious beliefs with the same intensity and sincerity as those employees protected under Section 19. This remedy can be provided "within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it." *Welsh v. U.S.*, 398 U.S. 333, 366-

67 (1970) (Harlan, J., concurring). *Accord Iowa Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244 (1931); *Califano v. Wescott*, 443 U.S. 76, 89-93 (1979). *See also* J. Ginsburg, *Some Thoughts on Judicial Authority & Repair of Unconstitutional Legislation*, 28 Clev. St. L. J. 301, 306-10 (1979)

III. WILSON LACKED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 19.

It may be claimed that petitioner Wilson did not establish his art. III standing to litigate the constitutionality of Section 19, although the administrative law judge noted that "[t]his man may very well have been telling the truth as to how he reads the Bible, or as to his personal religious convictions" (decision of administrative law judge in Appendix to Petition for Writ of Certiorari at 20A). In fact, Wilson admitted that his position "was a personal conviction of his upon which he rested his refusal," *id.* at 19a, even though "he relied upon quotations from the Bible." *Id.* Apparently Wilson's claims were generalized, and at no time did there appear to be an attempt upon Wilson's part to demonstrate that his personal objections to joining a labor union were prompted by religious beliefs "held with the same sincerity[1] and depth as those employees expressly covered by section 19 or held with the strength of more traditional religious convictions." *Welsh*, 398 U.S. at 337.

Thus, Wilson made "no attempt to provide a careful definition of the claim to exemption that . . . [he] ask the courts to carve out and protect." *Gillette v. United States*, 401 U.S. 437, 456 (1971). Therefore, there is no showing that Wilson was discriminated against as a result of the wording of Section 19 providing for exemption from union dues and initiation fees for the employee "who is a member of and adheres to established and traditional teachings

[1] The determination of the sincerity of a religious belief is a legitimate issue so long as it is "recognize[d]" that 'sincerity' is a concept that can bear only so much adjudicative weight." *Gillette v. United States*, 401 U.S. 437, 457 (1971).

of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations. . . ."

As this Court stated in *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474 (1982):

> Proper regard for the complex nature of our constitutional structure requires neither that the judicial branch shrink from a confrontation with the other two coequal branches of the federal government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus this Court has "refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interest entitle him to raise it." *Blair v. United States*, 250 U.S. 273, 279 (1919). The importance of this precondition should not be underestimated as a means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power." *Flast v. Cohen*, *supra*, at 95.

It should also be noted that if petitioner Wilson had a sincere religious claim he was not without judicial redress. Under Title VII, 42 U.S.C. § 2000e *et seq.*, plaintiff would be entitled to reimbursement with back pay and attorney fees. But even under Title VII, Wilson would have had to demonstrate that his beliefs were religiously based and sincerely held in order to make out a prima facie case. No less should be required of him here.

CONCLUSION

The Court must grant certiorari in this matter. Failure to do so will result in a tragic burden being placed on the free exercise rights of many religious citizens. The case, if allowed to stand, will erode many forms of accommodation that a sensitive government has historically taken to protect the religious practices of such persons.

If certiorari is granted, the Court can vacate the decision of the Sixth Circuit because Wilson lacked standing to challenge the constitutionality of the statute. Alternatively, the Court can find the language of Section 19, "under-inclusive" and remedy any defect by including within the protection of Section 19 all persons who for deeply held sincere religious reasons cannot join or financially support a labor organization.

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Respectfully submitted,

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